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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 342

ROBERT R. YOUNG, PETITIONER,

vs.

**THE HIGBEE COMPANY, WILLIAM W. BOAG, AND
J. F. POTTS**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SIXTH CIRCUIT**

PETITION FOR CERTIORARI FILED AUGUST 14, 1944.

CERTIORARI GRANTED OCTOBER 9, 1944.

No.....

United States Circuit Court of Appeals

SIXTH CIRCUIT.

In the Matter of

THE HIGBEE COMPANY,

Debtor.

} BANKRUPTCY No. 36,119.
}

ROBERT R. YOUNG,

Appellant,

vs.

THE HIGBEE COMPANY, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF OHIO, EASTERN DIVISION.

TRANSCRIPT OF RECORD.

ROBERT W. PURCELL,

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CHARLES K. ARTER AND L. C. WYKOFF,

Terminal Tower, Cleveland, Ohio,

*Attorneys for Appellees, C. L. Bradley
and J. P. Murphy.*

J. F. POTTS,

Auditorium Bldg., Cleveland, Ohio,

Attorney for Appellee J. F. Potts.

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CAPTION.

NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION, SS.

Record of the proceedings of the District Court of the United States within and for the Northern District of Ohio in the cause and matter hereinafter stated. Said action was commenced on the 8th day of August, 1935 and proceeded to final disposition on the 18th day of June, 1943, and during the progress thereof pleadings and papers were filed, process was issued and returned and orders of the court were made and entered in the order and on the dates hereinafter stated, to-wit:

Present: THE HONORABLE PAUL JONES,
United States District Judge.

In the Matter of

THE HIGBEE COMPANY,

Debtor.

} No. 36,119
BANKRUPTCY.

**AMENDED APPLICATION OF ROBERT R. YOUNG
FOR INSTITUTION OF PROCEEDINGS.**

(Filed November 20, 1942.)

Now comes Robert R. Young, applicant herein, and respectfully represents to the Court as follows:

1. That he is the owner of 138 shares of First Preferred Stock of The Higbee Company.

2. That he is one of the claimants to ownership of the securities to be issued in respect of the so-called Junior Indebtedness.

3. That at and prior to March 7, 1942 J. F. Potts was the owner of 250 shares of the First Preferred Stock of the debtor and William W. Boag was the owner of 10 shares of the First Preferred Stock of the debtor. Said Potts and Boag on behalf and in the interest of all of said holders of First Preferred Stock were prosecuting an appeal from the order of the United States District Court for the Northern District of Ohio, Eastern Division confirming the Amended Plan of Reorganization of the debtor.

4. On or about March 7, 1942 C. L. Bradley and J. P. Murphy, who have filed their claims in these proceedings, purchased said stock theretofore owned by Potts and Boag for a total consideration of \$115,000 which was then far in excess of the value of said shares. The purpose of this transaction was to induce and make possible the withdrawing and voluntary dismissal of the aforesaid appeal from the order of confirmation entered in these proceedings, thereby to deprive all of the holders of First Preferred Stock of the debtor of an adjudication by the Circuit Court of Appeals of the matters which had been presented by Potts and Boag in their said appeal.

5. In accordance with the purpose and intent of said acquisition of the Preferred Stock of Potts and Boag the appeal from said order of confirmation was dismissed on March 11, 1942.

6. To the extent of the difference between the fair value of the said 260 shares of First Preferred Stock theretofore owned by Potts and Boag and the total payment of \$115,000 made by Bradley and Murphy the said payment was for and in consideration of Potts and Boag making

possible the withdrawal and dismissal of said appeal. None of the funds so received by Potts and Boag have been delivered to or accounted for by them to this debtor or the Preferred Stockholders in whose interest the appeal was prosecuted although this should properly be done.

7. The foregoing conduct was wrongful, illegal and fraudulent to the interests of the Preferred Stockholders to the full knowledge, approval and cooperation of C. L. Bradley and J. P. Murphy who were equal participants in the aforementioned transaction. The said Bradley, Murphy, Potts and Boag should therefore be required to account and pay over to the debtor or its preferred stockholders a sum equal to the difference between the fair value of 260 shares of First Preferred Stock on March 7, 1942 and the full payment of \$115,000.

8. Applicant further represents that Messrs. Jones, Day, Cockley and Reavis, counsel for debtor in these proceedings, have already expressed their approval of the sale from Potts and Boag to Bradley and Murphy and they have taken advantage thereof to bring about the dismissal of the aforesaid appeal and they are not therefore properly qualified to conduct the proceedings for the restoration to the debtor or its preferred stockholders of the funds for which an accounting should be had.

9. Applicant will retain counsel at his own expense to institute, with the approval of the Court, appropriate legal proceedings to bring about the accounting and payment over of the funds above specified. Such legal services would be performed without charge to Higbee except such charge as may be approved by the Court in the event that the said litigation is successful and results in the making of payments to Higbee or its preferred stockholders by or on behalf of the persons charged.

WHEREFORE, applicant, Robert R. Young, respectfully prays that an order be entered either

(a) authorizing applicant to employ counsel for and on behalf of The Higbee Company to institute appropriate proceedings against J. F. Potts, William W. Boag, C. L. Bradley, J. P. Murphy and any other party who may be liable, to compel an accounting and payment over to The Higbee Company of a sum equal to the difference between

the fair value of the preferred stock which was sold by Potts and Boag to Bradley and Murphy on or about March 7, 1942 and \$115,000, the full purchase price of said stock; or

(b) directing J. F. Potts, William W. Boag, C. L. Bradley and J. P. Murphy to pay over to the First Preferred Stockholders of The Higbee Company the difference between the fair value of the preferred stock which was sold by Potts and Boag to Bradley and Murphy and said sum of \$115,000.

R. W. PURCELL,

Attorney for Robert R. Young.

**TRANSCRIPT OF PROCEEDINGS BEFORE HON.
WILLIAM B. WOODS, SPECIAL MASTER, MON-
DAY, NOVEMBER 23, 1942.**

(Filed January 2, 1943.)

APPEARANCES:

MESSRS. JONES, DAY, COCKLEY & REAVIS, by

MR. FRANK E. JOSEPH,

For The Higbee Company, Debtor.

MR. ROBERT W. PURCELL,

For Robert R. Young.

MESSRS. MCKEEHAN, MERRICK, ARTER & STEWART, by

MESSRS. CHARLES K. ARTER AND L. C. WYKOFF,

*For Messrs. Charles L. Bradley and James P.
Murphy.*

MR. J. FRED POTTS,

For Messrs. J. Fred Potts and William W. Boag.

MR. KENNETH NORDSTROM,

For the Securities and Exchange Commission.

Monday, November 23, 1942, at 10:00 A. M.

The Master: Gentlemen, this is the hearing on the application of Robert R. Young which was set for this morning. There has been an amended application for the institution of proceedings filed. I assume that everybody has copies of that.

Mr. Joseph: I have.

Mr. Wykoff: I have.

The Master: Are we ready to proceed?

Mr. Arter: We are ready.

Mr. Purcell: I am, if the Court please.

The Master: Is everybody in court who is at least somewhat interested?

Mr. Purcell: I believe so. I am ready to proceed.

The other day we tentatively decided that this morning should be a preliminary hearing in view of the fact that the amended application was only prepared and filed on Friday and that this morning we would fix a date at which

we would go ahead on the merits. I indicated to your Honor that I am ready to go ahead on the merits either this morning or at any other time, but I don't want—

Mr. Wykoff: At our meeting the other day I said that I would be prepared to go ahead this morning.

Mr. Arter: We are prepared to go ahead and get it disposed of.

Mr. Wykoff: There is no need to put it over. We can go right ahead now.

The Master: I am ready to go ahead.

Mr. Nordstrom: Mr. Ainsworth is not here this morning. He is away and I was asked to attend this hearing, and I should like to state that we have not received a copy of this amended application, that I know of.

Mr. Purcell: You have not?

Mr. Nordstrom: No; we haven't. However, unless the application is of an entirely different nature we have no objection, I believe, to your going ahead with this this morning on your amended application. We are not going to take a particularly active position in this controversy, as far as I know.

Mr. Purcell: Well, I don't care particularly, your Honor, but on Friday we decided that due to the fact that Mr. Potts was not present on that occasion and was out of town over the week end that we would not proceed this morning, but I am entirely ready to go on.

The Master: Mr. Potts is here and he can speak for himself this morning.

Mr. Purcell: Fine! I have no objection to going ahead in any proceeding.

Mr. Joseph: I have been in Washington for three months and I am a little out of touch with this, as I say, and may I ask this: When you speak about going ahead on the merits, is that the merits of the petition or is it just on the question of whether you have a right to go ahead?

Mr. Purcell: It is on the merits of the petition.

Mr. Wykoff: No.

Mr. Arter: On the merits of whether he has the right to file a petition.

Mr. Joseph: That is right.

Mr. Arter: That is the only thing that is pending before the Court at this time.

Mr. Joseph: I should like to be heard in order to state the position of the debtor on that question, if that question is before the Court at the present time. I don't know which question you are considering going on with on the merits.

Mr. Wykoff: It seems to me that I had a very definite understanding as to what we were going ahead with this morning. The original application was an application for leave, on the part of Mr. Young, to employ counsel and to institute a suit on behalf of The Higbee Company, a derivative action on behalf of The Higbee Company, for an accounting in favor of The Higbee Company for the difference between the actual value of the 260 shares that were purchased from Messrs. Potts and Boag and the amount that was paid for them.

Had that been the only application that was before your Honor, then I think there would have been no question but that, if your Honor had authorized him, then it was up to him to bring his lawsuit. On the other hand, if your Honor refused the authorization, that would have ended it.

However, since the application has been amended and he has asked for the alternative relief of an accounting on behalf of, or in favor of, the preferred shareholders, then it seems to me that your Honor has to first determine the question raised in the original application, and if your Honor determines that question against the applicant, then your Honor would have the right, if he cared to, to go ahead immediately on the merits of the second application or at least on the second point raised in the application; is that not right?

Mr. Purcell: As I have indicated, I think there is perhaps some doubt as to whether or not it is a derivative or a class suit. If the Court should determine that this is not to be instituted on behalf of the debtor, I would introduce the same evidence in the proceeding on behalf of the preferred stockholders.

Consequently, it seems to me that the proper way to go ahead is to introduce the evidence, and all the evidence, and then let the Court determine, after hearing the evidence, whether the action is properly instituted on behalf of the debtor or on behalf of its preferred shareholders only.

Mr. Wykoff: I am perfectly content to have that done.

The Master: Very well. Let's proceed then, unless there is some other objection.

Mr. Joseph: Your Honor, I again have to plead ignorance of what has taken place during the last three months. It seems to me that, in the orderly conduct of litigation, that first your Honor has to determine whether or not the litigant is properly in court and then if he is properly in court, why, then, you determine—

The Court: Sometimes you cannot do that. Sometimes you have to hear all the evidence to determine whether he is properly in court. This is particularly true in bankruptcy proceedings.

Mr. Joseph: I am only saying what I am saying because it makes a difference to The Higbee Company, although I assume it is not a matter of controversy, I attended the hearing before Special Master Russo Saturday on the new leases of The Higbee Company which, as you recall, C. T. B. must approve. There was no objection there on the part of any stockholder or creditor of C. T. B. or on the part of the Special Master, and it is my understanding that an order will go on this morning finally approving those leases. The Special Master took the position in C. T. B. that it wasn't necessary for him to file an interim report with the District Court. Therefore, we are practically ready for a discharge of the company.

The Master: This is not going to interfere with the discharge at all.

Mr. Joseph: If the parties are all agreed on that—

The Master: A journal entry was agreed upon by Mr. Abbott and these gentlemen to take care of that situation by the terms of which the discharge would be approved and this would go ahead.

Mr. Joseph: The parties to this litigation have all agreed that that entry of discharge may be approved and entered?

Mr. Purcell: Reserving jurisdiction over all phases of this controversy.

Mr. Arter: May it please the Court, the only thing pending before the Court is an application for the right to file a suit. Counsel states that the evidence will be the same on the application as on the other, and may I ask

then that we have a stipulation that all the evidence taken in this application be considered as taken in the other without the retaking of it with the right to add something, perhaps.

Mr. Purcell: That is entirely proper.

Mr. Arter: What?

Mr. Purcell: That is entirely agreeable.

Mr. Nordstrom: I would like to state that while this amended application is somewhat of a surprise to us, since we have not received a copy of it, I can also state that the position of the Commission is the same as it has been in the past, as stated by Mr. Sherwood in the hearing on allowances, and if this application is, as I understand it, an application only for an accounting in behalf of the preferred shareholders, that we believe that the Court is without jurisdiction to consider that matter. As we understand this present application, before it was amended it was a derivative action in behalf of the debtor.

The Master: It doesn't make much difference now. If this Court has jurisdiction then, all well and good, but if we do not have jurisdiction, then there is a question, and that question should be disposed of. As I see it, there is no reason why they cannot go ahead and close The Higbee Company matter, let The Higbee Company be discharged, and then determine this question one way or the other.

As I see it, there is no—

Mr. Nordstrom: We have no objection.

The Master: Then you are out of the reorganization and when the reorganization is done, are you still in The Higbee Company?

Mr. Nordstrom: So long as there is any reservation of jurisdiction, I should imagine we are still in.

The Master: All right. I don't see that you are going to be affected one way or the other. It doesn't make much difference except we would like to get this matter disposed of and we will go ahead that way.

Mr. Nordstrom: We have no objection to that. We would like to see it disposed of. We understand that the only application here this morning is just whether the Court should grant leave to sue on behalf of the debtor.

The Master: All right. Are you ready to go ahead?
Is that the understanding?

Mr. Purcell: We are ready, if your Honor please.

The Master: Proceed.

Mr. Purcell: I should like to offer in evidence the following exhibits:

First: I offer the objections to claims filed by the New Committee of Preferred Stockholders and verified by J. Fred Potts on August 8, 1938.

Mark that Young Exhibit 1.

(Marked Young Exhibit 1.)

Mr. Purcell: I offer the answer brief of New Preferred Stockholders' Committee to brief of C. L. Bradley and J. P. Murphy on motions dated December 15, 1938.

(Marked Young Exhibit 2.)

Mr. Purcell: I offer the objections to the amended plan of reorganization of The Higbee Company dated September 27, 1940, verified by J. F. Potts on November 2, 1940, and filed on or about that date with the Special Master.

(Marked Young Exhibit 3.)

Mr. Purcell: I offer the brief in support of objections filed by J. F. Potts and William W. Boag (preferred stockholders) to amended plan of reorganization of The Higbee Company dated September 27, 1940. That was filed in support of the objections which were marked Young Exhibit 3.

(Marked Young Exhibit 4.)

Mr. Purcell: I offer as Young Exhibit 5 the application for the appointment of special counsel for debtor filed by J. F. Potts and William W. Boag on December 20, 1940.

(Marked Young Exhibit 5.)

Mr. Purcell: I offer as Young Exhibit 6, brief filed by J. F. Potts and William W. Boag in support of application for the appointment of special counsel for debtor.

(Marked Young Exhibit 6.)

Mr. Purcell: I offer as Young Exhibit 7, the objections and exceptions of J. F. Potts and William W. Boag (preferred stockholders) to the ad interim report of the Special Master recommending approval of amended plan of reorganization, filed February 10, 1941.

(Marked Young Exhibit 7.)

Mr. Purcell: I offer in evidence as Young Exhibit 8, the brief in support of the objections and exceptions of J. F. Potts and William W. Boag (preferred stockholders) to the ad interim report of the Special Master recommending approval of the amended plan of reorganization.

(Marked Young Exhibit 8.)

The Master: Anything that is in this record is properly a part of this, isn't it?

Mr. Purcell: I think it is, but I felt that—

The Master: You can take your time, of course, but I think that you can give these papers to the reporter at some other time, if you care to have them a matter of record, but if it is something that is already in the record I don't think that you need to do it.

Do you have anything else?

Mr. Purcell: Everything that I expect to offer is in the record with the exception of one exhibit.

I offer as Young Exhibit 9, reply brief of J. F. Potts and William W. Boag (preferred stockholders) in answer to debtor brief re exceptions to plan of reorganization.

(Marked Young Exhibit 9.)

Mr. Purcell: I offer in evidence, as Young Exhibit 10, objections and exceptions of J. F. Potts and William W. Boag (preferred stockholders) to the ad interim report of the Special Master recommending denial of application for the appointment of special counsel filed February 17, 1941.

(Marked Young Exhibit 10.)

Mr. Purcell: I offer in evidence, as Young Exhibit 11, brief in support of objections and exceptions of J. F. Potts and William W. Boag (preferred stockholders) to the ad interim report of the Special Master recommending denial of application for the appointment of special counsel.

(Marked Young Exhibit 11.)

Mr. Purcell: I offer in evidence, as Young Exhibit 12, brief in answer to reply brief filed by debtor in respect to ad interim report of the Special Master recommending denial of application for appointment of special counsel.

(Marked Young Exhibit 12.)

Mr. Purcell: I offer in evidence, as Young Exhibit 13, brief in opposition to motion for new trial.

(Marked Young Exhibit 13.)

Mr. Purcell: I offer in evidence, as Young Exhibit 14, letter dated July 10, 1941, of independent preferred stockholders' committee.

(Marked Young Exhibit 14.)

Mr. Purcell: I offer in evidence, as Young Exhibit 15, objections and exceptions of J. F. Potts and William W. Boag (preferred stockholders) to the confirmation of amended plan of reorganization of the debtor approved by the Court on July 2, 1941, filed October 2, 1941.

(Marked Young Exhibit 15.)

Mr. Purcell: I offer in evidence, as Young Exhibit 16, notice of appeal of J. Fred Potts and William W. Boag (preferred stockholders of debtor), filed November 14, 1941.

(Marked Young Exhibit 16.)

Mr. Purcell: I offer in evidence, as Young Exhibit 17, statement of points on which appellants intended to rely on appeal filed November 25, 1941.

(Marked Young Exhibit 17.)

Mr. Purcell: I would like to offer in evidence a copy of the statement made by J. F. Potts at the hearing on December 18, 1940, before the Special Master, and I would like to have the record show that this statement was contained in the printed record of J. F. Potts and W. W. Boag at Pages 263 and 264 of their record on appeal to the Circuit Court of Appeals from the order approving the plan, and that this statement was designated by J. F. Potts for inclusion in the printed record.

(Marked Young Exhibit 18.)

Mr. Purcell: I offer in evidence, as Young Exhibit 19, excerpt from proceedings before Special Master in matter of the applications for allowances on Thursday, May 14, 1942, being pages 227 to 240 and 263 to 265, inclusive.

(Marked Young Exhibit 19.)

Mr. Purcell: I offer in evidence, as Young Exhibit 20, excerpt from report of Special Master of August 1, 1942, dealing with application of Potts and McNeal for compensation.

(Marked Young Exhibit 20.)

Mr. Purcell: I offer in evidence, as Young Exhibit 21, objections and exceptions of J. F. Potts and John H. McNeal to the report of the Special Master on allowances.

(Marked Young Exhibit 21.)

Mr. Purcell: I offer in evidence, as Young Exhibit 22, brief in support of exceptions and objections of J. F. Potts and John H. McNeal to report of the Special Master on allowances.

(Marked Young Exhibit 22.)

Mr. Purcell: I offer in evidence, as Young Exhibit 23, objections and exceptions of J. F. Potts to report of Special Master recommending denial of application for approval of sales of stock and brief in support thereof.

(Marked Young Exhibit 23.)

Mr. Purcell: I offer in evidence, as Young Exhibit 24, memorandum of Securities and Exchange Commission in reply to briefs of J. F. Potts and John H. McNeal in support of their objections to report of Special Master on allowances and application for approval of sale of stock.

(Marked Young Exhibit 24.)

Mr. Purcell: I offer in evidence, as Young Exhibit 25, memorandum of Judge Jones on report of Special Master on application for approval of stock sale and on allowances of compensation, filed September 3, 1942.

(Marked Young Exhibit 25.)

Mr. Purcell: I offer in evidence, as Young Exhibit 26, agreement of March 7, 1942, for sale of stock to Bradley and Murphy.

(Marked Young Exhibit 26.)

The Master: That takes care of your exhibits?

Mr. Purcell: Yes. I would like to have the record show in this case, and I assume it does, your Honor, that Messrs.

Bradley and Murphy have been represented by counsel in this proceeding since the year 1938. I assume that is true.

Mr. Wykoff: I don't know. Is that true?

Mr. John P. Murphy: I don't know the date.

Mr. Purcell: I don't know the date either, but it was in the year 1938 that your proof of claim was filed.

Mr. John P. Murphy: That was presented by counsel.

Mr. Purcell: The objections to it were verified on August 8, 1938.

Mr. John P. Murphy: That was filed by erstwhile counsel of Bradley and Murphy, Messrs. Fackler & Dye, who are not now counsel and haven't been in connection with the matter of this junior debt counsel for Bradley and Murphy.

Mr. Purcell: If your Honor please, my case consists entirely of these documents, and if it is agreeable to all parties present I will supply them all with a list of the documents which are being introduced, and if we may have a ruling that they are all admitted as exhibits here, why, I will proceed to introduce them one at a time.

The Master: Just a minute. I haven't heard any objection to any of these.

Mr. Arter: They may be considered as admitted if you will furnish us with a list of what you have.

Mr. Purcell: Surely.

The Master: All the documents that have been offered by Mr. Purcell will be considered as admitted and a part of this record; that is, admitted in evidence and made a part of this record.

You can make up your record now.

Mr. Arter: Do you rest now?

Mr. Purcell: I rest on these documents and the record as it will stand after I have introduced evidence.

Mr. Arter: Just to keep the record clear, we make a motion at this time that the application be dismissed.

The Master: At this time decision on the motion will be reserved.

You may proceed.

Mr. Arter: You offered that contract, didn't you?

Mr. Purcell: Yes, sir.

Mr. Arter: Bradley and Murphy offer in evidence application of Robert R. Young filed in the United States

Circuit Court of Appeals for the Sixth Circuit, case No. 9148, the cause being entitled "J. Fred Potts and William W. Boag against The Higbee Company," filed March 9, 1942, and ask that it be marked Bradley and Murphy Exhibit 1.

(Marked Bradley and Murphy Exhibit 1.)

Mr. Arter: Memorandum opposing application for leave to appeal filed on behalf of Bradley and Murphy.

(Marked Bradley and Murphy Exhibit 2.)

Mr. Arter: Memorandum in support of application of Robert R. Young for leave to intervene and be heard, all of these papers having been filed in the same cause and all before the United States Circuit Court of Appeals, Sixth Circuit, in case No. 9148.

(Marked Bradley and Murphy Exhibit 3.)

Mr. Arter: Memorandum opposing application of Robert R. Young for leave to intervene, filed in the same cause, March 9, 1942. This is by Bradley and Murphy.

(Marked Bradley and Murphy Exhibit 4.)

Mr. Arter: That document was filed by Bradley and Murphy.

Mr. Purcell: Are you offering these now?

Mr. Arter: I am offering each of them.

Mr. Purcell: I want to state my objection to them.

Mr. Arter: Memorandum of the debtor filed in the same cause before the United States Court of Appeals for the Sixth Circuit.

(Marked Bradley and Murphy Exhibit 5.)

Mr. Arter: Memorandum in support of application of Robert R. Young for leave to intervene and be heard, filed in the same cause on March 10, 1942.

(Marked Bradley and Murphy Exhibit 6.)

Mr. Arter: Application of Robert R. Young for leave to intervene, filed in the same court, in the same case, on March 10, 1942.

(Marked Bradley and Murphy Exhibit 7.)

Mr. Arter: A true and attested copy of a journal entry in the same cause, reading as follows:

"No. 9148. United States Circuit Court of Appeals for the Sixth Circuit. Filed March 11, 1942. J. F. Potts and William W. Boag, Appellants, vs. The Higbee Company, Appellee.

"Before Simons, Allen and Martin, JJ.

"Pursuant to stipulation of counsel, it is now ordered that appeal herein be and the same is dismissed.

"Approved for entry, Charles C. Simons, Circuit Judge."

It bears the seal of the court and the attestation of the Clerk.

(Marked Bradley and Murphy Exhibit 8.)

Mr. Arter: A true and attested copy of the journal entry in the same cause, reading as follows:

"No. 9148. United States Circuit Court of Appeals for the Sixth Circuit.

"J. F. Potts and William W. Boag, Appellants, vs. The Higbee Company, Appellee. Filed March 11, 1942. Before Simons, Allen and Martin, JJ.

"The application of Robert R. Young for leave to intervene, having been considered by the Court, it is now ordered that said application be and the same is denied.

"Approved for entry, Charles C. Simons, Circuit Judge."

It bears the seal of the court Clerk and the attestation of the Clerk of the court.

(Marked Bradley and Murphy Exhibit 9.)

Mr. Purcell: We can't consent to your offering them.

Mr. Arter: Mr. Wykoff, will you be sworn?

L. C. WYKOFF, being first duly sworn, testifies as follows:

DIRECT EXAMINATION OF L. C. WYKOFF by Mr. Arter.

Q. Mr. Wykoff, were you present at the Circuit Court of Appeals on or about March 9 or 10 when a hearing was had for the right of Mr. Young to intervene on the question of dismissal by Messrs. Bradley and Murphy of the appeal theretofore taken by Messrs. Potts and Boag? A. I was there on the 10th and 11th, this year.

Q. Of March, 1942? A. That is right.

Q. Had certain of these papers, which I have introduced into evidence, been filed when you arrived? A. Well, not all of them, but some of them, yes.

Q. Can you tell us which ones? A. Yes, if you will hand them to me.

Bradley and Murphy Exhibit 1.

Q. Which is what? A. Which is an application for leave to intervene and appeal by Robert R. Young as the owner of 138 shares of the first preferred stock of The Higbee Company. That had been filed.

Q. Any others of these documents? A. I think none of them had been filed at the time I arrived on March 10.

Q. Who were present? Who, of counsel, were present? A. On the morning of the 10th at a hearing, my recollection is that it was in Judge Simons' chambers, there were present Mr. Koykka—

Q. Representing whom? A. Of our firm, representing Messrs. Bradley and Murphy. I was present, Mr. Swigert, of the firm of Taft, Stettinus & Hollister, was present.

Q. Representing whom? A. I should say that he was acting on behalf of Messrs. Bradley and Murphy or The Higbee Company. I am not sure which. I think it was Bradley and Murphy. While the hearing was in process a Mr. Kunkel—I can't give you his first name, but if you will let me refresh my recollection from that memorandum—

Mr. Purcell: Mr. Paul Kunkel?

A. Mr. Paul Kunkel was present on behalf of Robert R. Young.

Q. Who is Mr. Paul Kunkel? A. Mr. Paul Kunkel is an attorney of Cincinnati and a member of the firm of Kunkel & Kunkel.

Q. Were there any other attorneys present? A. Not on the 10th.

Q. Did others come before the hearing? A. On the following day.

Q. Who were they? A. Not that day.

Q. Yes; on the 11th. A. On the 11th—I must correct myself—on the 10th Mr. Chapman Rose was present on behalf of The Higbee Company. Then on the 11th there was present Mr. Purcell and Mr. Butler, in addition to

Mr. Kunkel, on behalf of Robert R. Young. Mr. Potts was present. Now, I am not sure whether Mr. Potts was present on the 10th, or not, but I remember distinctly that he was there on the 11th. I was there. Mr. Koykka was there. Mr. Swigert was there. Mr. Gardner Abbott was there on behalf of The Higbee Company. I think that is all.

Q. And what members of the court were present at any hearing? A. It is my present recollection, but I can be certain if I am permitted to refresh my recollection.

Q. You may refresh your recollection. A. On the morning of March 10—

Q. Let me withdraw that question, if you please. Mr. Wykoff, you arrived in Cincinnati and went before the Court or were available for the Court at what time? A. Well, I flew in there and got there the evening of the 9th, and I was in court on the morning of the 10th.

Q. And did you remain and were you present at all hearings until the matter then before the Court was finally determined? A. Yes.

Q. Now, without my asking repeated questions, will you just state what occurred?

Mr. Purcell: I object to any such question as that. I think that counsel ought—

Q. All right. Was there a hearing or were you before the Court on the 10th? A. On the morning of the 10th I went along with Mr. Koykka and Mr. Chapman Rose to the Clerk's Office of the Circuit Court of Appeals and Mr. Menzies, the Clerk, gave me the original of Bradley and Murphy Exhibit 1.

Q. Which is— A. Which is an application for leave to intervene and appeal filed by Robert R. Young as a holder of first preferred stock of The Higbee Company. He also handed to me that morning Bradley and Murphy Exhibit 2.

Q. Which is— A. Which, apparently, and I think it is, a memorandum opposing the application which apparently had been filed on behalf of Bradley and Murphy the night before because it was in the Clerk's Office that morning.

Q. By Mr. Koykka? A. By Mr. Koykka and Mr. Swigert, but it was on file that morning.

Mr. Purcell: Well, if the Court please, I object. I think that this examination should be conducted by the regular interrogation method.

Mr. Arter: I am doing that. It is entirely in response to my question.

The Master: Proceed.

Q. Were you before the Court that day? A. No; not immediately. I think we were before the day was over, but Mr. Menzies told us that the stipulation which had been filed—

Q. Stipulation for what? A. Stipulation for dismissal, which had been filed, signed by J. Fred Potts.

Q. That is not responsive to the question. I am asking what occurred.

Mr. Purcell: That wasn't the question at all.

Q. Then I will ask you now, what occurred on the 10th? A. Mr. Menzies notified us that the stipulation which had been filed, signed by J. Fred Potts, on behalf of the Appellants, and by The Higbee Company, on behalf of the Appellee, would be submitted to Judge Simons in his chambers and that we would not be permitted to appear before him.

About 12:30 Judge Simons sent word to us that he would hear us at 1:30 in the afternoon. At 1:30 in the afternoon, or at least by 1:30 in the afternoon—

Q. Of the 10th? A. Of the 10th, yes, an additional application on behalf of Robert R. Young for leave to intervene had been filed.

Q. And is that the document which is marked Exhibit 7, Bradley and Murphy Exhibit 7? A. Yes; and at the same time, on behalf of Bradley and Murphy, a memorandum opposing the application of Young for leave to intervene was filed, and that is Bradley and Murphy Exhibit 4, and a memorandum in support of the application of Robert R. Young for leave to intervene and to be heard was filed prior to noon, and that is Bradley and Murphy Exhibit 3.

Now, I cannot be certain whether it was before noon or after noon that a memorandum was filed on behalf of the debtor and an additional memorandum was filed on behalf of Robert R. Young.

Q. What are the exhibit numbers? A. They are Exhibits Nos. 5 and 6, Bradley and Murphy Exhibits 5 and 6.

As I say, I cannot be certain whether it was before the hearing at 1:30 that day or whether it was afterwards that those two memoranda were filed.

Q. Have you stated what counsel were present at that hearing? A. We haven't gotten to the hearing yet.

Q. All right. A. At 1:30—

Mr. Purcell: I object to counsel reading from—

The Witness: I am just trying to get this right.

Mr. Purcell: I object to it as a self-serving declaration.

The Witness: I am trying to get this right. I can give my best recollection, but I think it would be better to refresh it from this.

The Master: I think that he is entitled to refresh his recollection from it.

What is it that you are reading from?

The Witness: I am reading from a memorandum that I dictated immediately upon my return.

The Master: You may proceed. You may cross-examine about it later, Mr. Purcell.

A. At 1:30 in the afternoon—

Q. Of the 10th? A. Of the 10th, Mr. Koykka, Mr. Chapman Rose, Mr. Swigert and I went to Judge Simons' chambers, and when we got there we found, in addition to Judge Simons, Judge Martin and Judge Allen.

Q. Being all the members of the court? A. I think that the Circuit Court of Appeals has five or six members.

Q. Constituting a complete— A. It was a complete court.

Q. Yes. A. Mr. Kunkel was not present at that time. Judge Simons asked for an explanation of why there was haste in having the appeal dismissed.

I explained to the Court that about the 3rd or 4th of March the Shaker Heights & Terminal Realty Company, which was a company controlled by Mr. Young and his associates, had acquired the note for five hundred and some odd thousand dollars which Bradley and Murphy had given to the Ball Foundation in partial payment of the so-called Higbee securities which Bradley and Murphy had

purchased from the Ball Foundation, and that immediately upon the acquisition of the note by the Realty Company notice had been served upon Bradley and Murphy by the Realty Company that they had elected to call the note due and payable, and that they proposed to sell the collateral on the Court House steps.

Mr. Purcell: If the Court please, this doesn't seem to me to be the proper way to prove the contents of that notice.

Mr. Arter: I am not seeking to prove the contents of the notice. You, of course, have the right to put in the notice, if you care to. My question is: What occurred before the Circuit Court of Appeals?

The Master: Just state what occurred there.

A. Well, this is what I said to the Circuit Court of Appeals.

Mr. Purcell: I object to any narrative statement which is intended to prove the facts.

The Master: I take it that he isn't giving that.

Mr. Arter: I am simply asking what occurred before the Circuit Court of Appeals and counsel is telling what he stated.

The Master: You may proceed.

Q. Proceed, Mr. Wykoff. A. I think that I said that the collateral was to be sold on the Court House steps on March 13, this being March 10.

I explained to the Court that under the amended plan of reorganization the so-called Higbee securities would result in the owner of those securities receiving a Higbee Company note for \$600,000 and something in excess of the majority of the common stock.

Q. Of The Higbee Company? A. Of The Higbee Company; that negotiations had been carried on by Bradley and Murphy for the purpose of borrowing sufficient funds to finance the payment of the \$540,000 note, and that we had been assured that the collateral was of sufficient value to support a loan of that amount of money, but that because of the appeal which had been filed on behalf of Potts and Boag the final approval of the amended plan of reorganization was held up and would continue to be held

up as long as that appeal existed, and as a result, so long as that appeal was in existence, the collateral was of little value for the purposes of security in borrowing large sums of money; that, as a result, Bradley and Murphy had carried on negotiations with Potts and Boag, and had purchased Potts' and Boag's securities in order to succeed to the rights of Potts and Boag, and thus be able to accomplish a dismissal of the appeal in the Circuit Court of Appeals; that by so doing this would constitute a final confirmation of the plan of reorganization and that as soon as the plan of reorganization was finally confirmed it would be a simple matter for Bradley and Murphy to finance the payment of the \$540,000 note, but that since more than half a million dollars had to be raised, and it had to be raised before the 13th of March, there was, of course, great haste necessary in order to accomplish that objective.

At about that time Mr. Kunkel came into the hearing and in Mr. Kunkel's presence I explained to the Court that as soon as the Realty Company had acquired the \$540,000 note that a foot race took place between Bradley and Murphy, on the one hand, and Young and his associates, on the other, to acquire the Potts and Boag stock, and that it was rather obvious that perhaps we had run a little faster because we had acquired it. Mr. Kunkel said, when I had finished my statement, that he was not at all familiar with the facts and that he was not in a position to either admit or deny any representation I had made to the Court, but that he expected Senator Bulkley to be in Cincinnati the following morning, and asked that the Court do nothing further until Senator Bulkley could have an opportunity to be there and act on behalf of Mr. Young.

Now, I think that is all that took place that day, but if you will let me look at this memorandum a moment to refresh my recollection—

Q. While you are refreshing your recollection, Mr. Wykoff, was anything said to the Court on that day relative to the actual value of the stock and the amount paid?

A. I am trying to find out whether it was that day or the next day.

Q. All right. Proceed. A. Yes; there was one other matter that was before the Court that day. A telegram, which Judge Simons showed to all of us, came to him from

the Securities and Exchange Commission in which they stated that they had received no notice of the application to dismiss, but that, in their opinion, the plan was fair and equitable.

Mr. Purcell: I don't think that it is proper to prove the contents of a telegram here by a statement of the witness. I think it is—

The Master: Just a minute.

Mr. Purcell: I think that it is entirely improper.

Mr. Arter: You have a right to ask for the telegram. If you insist, we will get it.

Mr. Purcell: I insist that the telegram be produced here, if there is such a telegram.

The Master: He is merely stating what Judge Simons said to them. You may proceed with it.

Q. Proceed, Mr. Wykoff.

Mr. Arter: I will state to the Court that Mr. Nordstrom, from the Commission, says that he has a copy of that telegram in his office and he will produce it.

The Master: Very well.

Mr. Arter: And we state to the Court that we will have it here.

A. Well, all I intend to say in this recital is that Judge Simons read the telegram to us.

Q. Yes. Well, then, you may state what he read. A. The telegram, it is my recollection, stated that they had not received any notice.

Mr. Purcell: That is what I object to.

The Master: Well, the telegram will be offered here. We will let the statement go out.

A. Then Judge Simons asked us all to step out of his chambers and to wait until he called us. In a few minutes he told us that the matter had been adjourned until 10:30 the following morning, which was March 11. That is the end of March 10.

Q. All right. Now, then, on March 11, will you state who was present and what occurred, and what documents, if any, that have been introduced into evidence here, were filed that day? A. Well, it is my recollection that all the

documents that have been introduced this morning had been filed either on the 10th of March or prior to the 10th of March. It is a possibility, however, that Bradley and Murphy Exhibit 6—

Q. Which is— A. —which is a memorandum in support of the application of Robert R. Young for leave to intervene and to be heard may not have been filed until March 11. It is dated March 10 and apparently it was brought down by Mr. Butler and Mr. Purcell. Consequently, it is probable that that wasn't filed until the 11th.

Now, on the morning of March 11 there were present Messrs. Kunkel, Purcell and Butler, representing Robert R. Young; Gardner Abbott and Chapman Rose representing the debtor; J. F. Potts, representing Potts and Boag; Messrs. Swigert, Koykka and I representing Bradley and Murphy.

Q. What occurred? A. This hearing again was in Judge Simons' chambers, there being present Judges Simons, Martin and Allen.

Judge Simons first detailed what had occurred the day before and he told counsel for Mr. Young that he had delayed taking any action so that they might have an opportunity to be heard. Very long statements were made on behalf of Robert Young.

Q. By whom? A. I cannot tell you who made the long one and who made the short one, but I remember that it was Mr. Purcell and Mr. Butler who spoke and the two of them together consumed quite a lot of time. I cannot tell you who was the more verbose of those two.

Q. What was the gist of that statement? A. Well, in general, a description was given of the acquisition of the so-called Higbee securities at the Morgan auction, the opinion of the Circuit Court of Appeals in the Van Sweringen Company case in which the Circuit Court of Appeals reduced the amounts of certain claims which had been acquired at that auction to nominal figures was commented on at length.

It is my recollection that Mr. Abbott represented to the Court that at a hearing in these proceedings much earlier Mr. Young or his counsel had approved the plan of reorganization.

It is also my recollection that Mr. Purcell said that Mr. Young had no objection to the reorganization plan and that he did not intend to oppose the plan.

It is also my recollection that Mr. Purcell denied vehemently that there had been any foot race for the purchase of the Potts and Boag stock and I think, as I recall it, that he ~~denied~~ that he had made any offer to purchase it.

I remember distinctly that Judge Simons asked Mr. Purcell why it was that if the plan of reorganization was good enough to approve a few days ago it was so bad today that it should be opposed. I do not remember what Mr. Purcell's answer to that question was.

At the conclusion of these arguments—

Q. Just a moment. In those arguments was anything stated by Mr. Purcell or Mr. Butler as to Mr. Young's rights in the premises to oppose? A. Yes; the principal argument, as I recall it, was based on this, that Potts and Boag had brought this appeal as the representatives of a class and not on behalf of themselves. That was Young's argument.

Q. As given by Mr. Purcell and Mr. Butler? A. That is right; and that if the appeal were permitted to be dismissed by Potts and Boag that the other preferred shareholders, on whose behalf he was acting, would be deprived of the right of a judicial determination of the fairness of the plan of reorganization.

Q. When you say "other stockholders," was it stated as Mr. Young being included among those other stockholders or that he was a stockholder? A. In the application, if you will recall, he said that he filed his application as the holder of 138 shares of first preferred stock.

Q. All right. Proceed. A. Judge Simons sent for the record, the printed record, which was before him, and examined the appeal.

By Mr. Purcell:

Q. Do you know what he examined? A. Well, if you will wait just a moment, you will hear the statement that he read the appeal itself.

Q. Did he read it aloud? A. He read it aloud. Mr. Purcell said that it was true that the appeal itself purported to be on behalf of Potts and Boag in their individual

capacities, but that, in fact, it was brought as the representatives of a class. That is all I recall of what occurred at the hearing. We were all excused.

By Mr. Arter:

Q. How long did that hearing last? Not to be exact, but about? A. I would say from an hour to an hour and a half. Perhaps longer.

Q. All right. You say that you were all excused? A. We were all excused and told to wait outside, and within about ten minutes—

Q. Who remained in the room? A. Just the three Judges. In about ten minutes, the Clerk, Mr. Menzies, came out and said that Judge Simons wanted two journal entries prepared in very brief language, one dismissing the appeal and the other denying the application of Young to intervene and to carry on the appeal.

Q. When that request was made who were present? A. Well, I am only assuming that Mr. Purcell was present, although I am not certain that he was present, when Mr. Menzies came and gave me that message. However, he was in the vicinity.

Mr. Arter: Were you, "Bob"?

Mr. Purcell: Yes.

Mr. Arter: Mr. Purcell admits that he was present.

A. The journal entries were prepared, in fact, by the Clerk and were placed on Judge Simons' desk.

By Mr. Arter:

Q. Did you examine them? A. Yes.

Q. Do you know whether or not Mr. Purcell examined them? A. I have no doubt but that he did, but I can't remember seeing him do it.

Mr. Arter: Is it admitted that you did?

Mr. Purcell: Yes; I examined them.

A. And after the journal entries were prepared they were put on Judge Simons' desk and I think we all waited—I know I did—until the Clerk brought them back, signed by Judge Simons, and I ordered immediately these two certified copies.

By Mr. Arter:

Q. And were the journal entries, that you referred to, the two journal entries marked, respectively, Bradley and Murphy Exhibits 8 and 9? A. Yes; they were.

Q. Was there anything further before the Court or did you appear before the Court further? A. I don't remember of anything else.

Q. And am I correct in understanding that the matters before the Court, concerning which, you say, these arguments and statements were made, were, or are, the matter evidenced by the exhibits of Bradley and Murphy which have been introduced in this hearing? A. They are copies of the documents that were on file.

Q. And that was the only matter before the Court? A. Do you mean that was the only case before the Court?

Q. That was the only matter before the Court, the only proceeding? A. The Court was sitting in this proceeding in case No. 9,148.

Q. When you say "long statement" what do you mean? How long? How many minutes? A. Well, it seemed to me as if I listened to both Mr. Purcell and Mr. Butler for at least an hour. Now, I may have overestimated it, but my present recollection is that it was at least an hour.

Q. Do you think of anything further, Mr. Wykoff, that I haven't asked you about? A. No; not with respect to that.

Mr. Arter: You may examine.

CROSS EXAMINATION OF L. C. WYKOFF by Mr. Purcell.

Q. Do you recall that when Mr. Menzies came out and suggested the preparation of these journal entries that he specifically instructed counsel not to include any reasons for the making of the entries? A. I don't remember that, but I remember that he said that the Court wanted them very short.

Q. Do you remember that he said that the Court wanted no reasons or preambles to these journal entries whatever? A. I think that when he said that the Court wanted them very short that would accomplish that. I have no recollection, Mr. Purcell, of his saying anything except that he wanted them very short. I remember that I did dic-

tate two journal entries that perhaps were twice as long as these two journal entries and the Clerk said that he thought that they were too long, and he just prepared these himself.

By Mr. Arter:

Q. That is, the Clerk prepared them? A. Yes.

Mr. Purcell: I have no further cross examination.

Mr. Arter: That is all.

The Master: Is there any examination by anybody?

Mr. Arter: We would like to put on Mr. Koykka. Mr. Koykka is now in the trial of a case in the Court of Common Pleas. I think that during the day we can have him here.

The Master: Is there anyone else that you want to put on now?

Mr. Wykoff: Mr. Potts.

J. F. POTTS, being first duly sworn, testifies as follows:

EXAMINATION OF J. F. POTTS by Mr. Wykoff.

Q. Your name is J. F. Potts? A. That is right.

Q. And you are a member of the Bar of Ohio? A. That is right.

Q. Have been for a good many years? A. Yes.

Q. Mr. Potts, you were the owner of 260 shares of first preferred stock of The Higbee Company or 250 shares of preferred stock of The Higbee Company, were you? A. I had legal title to it.

Q. And you acted also on behalf of Mr. Boag? A. I did.

Q. How many shares did he have? A. Ten shares, I think.

Q. You filed your objections to the amended plan of reorganization some time in September of 1940; is that correct? A. I doubt whether those objections were filed until some time in October because the amended plan of reorganization was not submitted until September 21, I think, and then we had a number of hearings and were given a date some time, I think, in October or maybe early in November, to file our objections.

Q. Did you have at that time any talks with Robert R. Young with respect to him joining with you as an objector?

A. Yes; I had a number of conversations with—did you say with Mr. Young?

Q. Either Mr. Young or his counsel. A. No; I talked to Mr. Purcell.

Q. And will you tell us what those conversations were that thus—did those occur in October, about the time that you were getting up your objections? A. Yes; that is right. I talked to Mr. Purcell and I suggested that Mr. Young join with us in making these objections, and I am sure that Mr. Purcell said that he would write Mr. Young and ask him if he wanted to join in the objections and later on he informed me that Mr. Young did not wish to join in the objections.

Q. Did you, however, receive some help from Mr. Young or through his counsel? A. Mr. Purcell gave us some very valuable help.

Q. In the preparation of your objections? A. That is right.

Q. That continued, did it, until the lawsuit was filed some time in the summer of 1941 by which Young and Kirby sought to establish a constructive trust against Bradley and Murphy in the ownership of the Higbee securities? A. That is correct. Mr. Purcell called me up some time, I think, just after that lawsuit was filed and he told me, or reminded me, that he had said that some day we might be on opposite sides of the table in this controversy and that time had arrived, and that he was no longer interested in helping in the objections.

Q. Did he say anything about what his position was with respect to the plan of reorganization in so far as it related to the junior debt? A. I don't remember his exact words, but he said that it was quite obvious that in his suit to obtain the Higbee securities from Bradley and Murphy he would be interested in having Bradley and Murphy get all that they could of the junior debt.

Q. Late in 1941 did you have any talk with Mr. Purcell with respect to a proposed acquisition by Mr. Young of the Bradley and Murphy note? A. Yes; Mr. Purcell called me up and told me that he thought that Mr. Young in his settlement with Mr. Ball would acquire the Higbee securities together with the Bradley note.

Q. And did he say anything further about it? A. Yes; he said that if that took place, that they acquired the securities, that he wanted to come over and talk to me concerning the dismissal of the appeal.

Q. Did he keep you informed of the progress of his negotiations with the Ball Foundation from that time on?

A. Yes. I don't know whether he called me or whether I called Mr. Purcell, but one of the conversations that we had on the phone was to the effect—well, he said he was still confident that Mr. Young would obtain the Bradley and Murphy note and the Higbee securities involved. One of his reasons for confidence was that two attorneys on the other side were on vacations and it was indicated they would be on vacations until just before the hearing in Indianapolis. I have forgotten the date of the hearing. I think it was scheduled for some time late in February. It might have been on the 19th. I don't know.

Q. And did he again discuss the question with you of making some arrangement with you for the dismissal of your appeal? A. I think he discussed that question, but I might be mistaken about it because I think I told Mr. Purcell that if that happened and he wanted to discuss dismissing the appeal he could come to my office, and I would be glad to sit down with him.

Q. Up to that time though you had had no discussion of the basis upon which the appeal was to be dismissed or—

A. Well, not in detail. However, Mr. Purcell, I think, did suggest that Mr. Young might be willing to make some concessions to the stockholders in reducing the amount to be received on the junior debt and take more common stock in lieu thereof. I don't recall at this time any other suggestions about terms or conditions under which the appeal would be dismissed.

Q. Do you recall that shortly after, or perhaps some time in February, of this year, that you went to California?

A. Yes; I recall that.

Q. Do you recall a telephone conversation that you and I had on March 3? A. I recall that there was a telephone conversation. I don't recall the exact date.

Mr. Arter: He in California and you in Cleveland?

Q. You were in California and I was in Cleveland?
A. I think I was starting back that day.

Q. That is right. A. I don't recall whether it was the 3rd, or not. I thought it was a little later than that. It might have been on the 3rd.

Q. Well, in that conversation did I discuss with you the purchase of your stock and Mr. Boag's stock? A. You did.

Q. And did you mention some figures at that time at which you thought probably you could accomplish a sale of it? A. Yes, I think I did rather reluctantly, but you insisted upon a figure. I wanted to wait until I got back to Cleveland and talked it over, but you insisted upon a figure.

Q. What was the figure that you named? A. One hundred thousand dollars.

Q. Do you recall that you were to be back in Cleveland on a Friday? A. That is right.

Q. Of that week? A. Yes. I think it was on Tuesday.

Q. Well, now, I met you in Chicago, did I not? A. That is correct.

Q. And that was on Thursday? A. I think it was Thursday, about noon or a little after.

Q. Of that same week? A. Yes.

Q. You had come in from California on one of those fast trains? A. Yes; on the Super Chief.

Q. Did you and I have some talk in Chicago that day? A. Quite a little talk.

Q. And did you also have some long distance conferences with Mr. Boag that day? A. Yes; I called Mr. Boag.

Q. And did you learn from Mr. Boag that he was going to be easy to handle or that he wasn't going to be easy to handle? A. Well, I don't know how to answer that.

Q. Well, what is the fact? A. I thought at the time that he would be fairly easy to handle.

Q. That was on Thursday? A. Yes.

Q. On Friday, when you got back to Cleveland, did you have some talk with Mr. Purcell? A. Yes. Mr. Purcell came to my office in the afternoon of that day, I am pretty sure, around about 2:00 o'clock. I might be mistaken about the time.

Q. And had you talked to him on the telephone during the day? A. Yes; I think I talked to him. I don't know

whether I called him or he called me about coming over with Mr. Boag.

Q. Did Mr. Purcell confer with Mr. Boag and you in your office? A. Yes; he did. When I got back to my office there was a telephone call there from Mr. Purcell which apparently had come in a couple of days before. I called him as soon as I got back from California.

Q. What occurred in the presence of you and Mr. Boag when you were talking with Mr. Purcell that day? A. Oh, I don't remember all of the conversation because there was quite a bit of it. I told Mr. Purcell that we had been made an offer for our stock. It wasn't hay; that I didn't feel like telling him what it was, and he said that his client would meet any offer that we had. He didn't say he would go above it. He said he would meet any offer, and he said that he would get in touch with Mr. Young. There was a lot of talk between Mr. Purcell and Mr. Boag. Mr. Boag talked to me about their conversations and I am a little hesitant about saying which part of the conversation was in my presence and which was in Mr. Boag's presence. Mr. Boag left after his conference with Mr. Purcell and I think he later had some conversations with Mr. Purcell himself.

Q. Did Mr. Purcell in any of these conversations that he had with you say anything about what they were going to do to try to prevent Bradley and Murphy from borrowing enough money to pay the note? A. Yes. He said that he was going to put propaganda on the street in an effort to prevent the borrowing of that money. I think I told Mr. Purcell that he, or his client, might not be interested in this stock because there was a possibility, in my estimation, that Mr. Murphy and Mr. Bradley might be able to raise the money without the appeal being dismissed.

Mr. Purcell: May I hear that, please?

The Reporter: (Reading)

"I think I told Mr. Purcell that he, or his client, might not be interested in this stock because there was a possibility, in my estimation, that Mr. Murphy and Mr. Bradley might be able to raise the money without the appeal being dismissed."

Q. Did Mr. Purcell say anything to Mr. Boag about what his services were reasonably worth for what he had done?

Mr. Purcell: I don't understand that question.

Mr. Wykoff: Maybe the witness does.

A. I couldn't tell you that. He didn't say that in my presence. Mr. Boag told me that he said the sum of \$25,000.

Mr. Purcell: I object to it.

Q. That isn't what he said in your presence.

Mr. Purcell: I object to anything that Boag told this witness.

The Master: What is the question?

Mr. Purcell: If your Honor please, Mr. Potts is saying here, or he is trying to testify as to something which Boag told him that I told Boag. Now, if they want to get Mr. Boag in here to testify, that is all right.

Mr. Wykoff: I am only asking for what happened in his presence.

A. I said that didn't happen in my presence.

The Master: That is all there is to it then. Proceed.

Q. Did the demand increase from the time that you gave it to me over the telephone and the time that we actually completed our negotiations? A. Well, do you mean the demand for Mr. Boag?

Q. Your price, I mean. A. Well, yes; it did. That evening, of course, you and I talked and I told you the result of my conversation with Mr. Boag, and I told you that I thought Mr. Boag would be willing to take a proportionate share of \$100,000, which was either \$3,000 or \$4,000, for his stock. That day, however, his price went up from \$5,000 to \$25,000.

Q. Was that the day that he talked with Mr. Purcell?

A. That is right. The reason he gave to me was that he—

Mr. Purcell: Wait a minute now. I don't want to have any—

The Witness: I will state the reason if the Court cares to hear it. If it doesn't, I won't.

Q. Let me ask you this question, and then the Court can pass upon it: Did Mr. Purcell assign any reason—

Mr. Purcell: Did who?

Q. Did Mr. Boag assign any reason for the increase in his price for his stock? You may answer that yes or no.

A. Yes; he did.

Q. Will you state what that reason was?

Mr. Purcell: If the Court please, if they are asking for testimony by Mr. Potts as to what I am reputed to have said to Mr. Boag—

Mr. Arter: All he is asked to give is the reason he gave Mr. Potts.

Mr. Purcell: —outside of the presence of Mr. Potts, then I object to it.

Mr. Arter: All we are asking for is what Mr. Boag said to Mr. Potts as to the increase, if there was one, or not.

The Master: He may answer that. I think that they are entitled to it because the claim is against Boag and Potts.

Mr. Purcell: May I be heard for a minute?

His previous answer indicated that if he is permitted to answer this question he will give Boag's version of the conversation between myself and Boag. Now, that is purely hearsay and entirely improper.

The Master: No; what Boag said to him is competent.

Mr. Purcell: I object to it.

Mr. Arter: That is all we are asking for, what Mr. Boag stated to Mr. Potts.

The Master: You may cross-examine him.

A. Mr. Boag said that Mr. Purcell had offered him \$25,000 for his stock to be paid for in the notes to be received from Higbee and that his services were well worth \$25,000, if not more; that is, the services rendered in the reorganization.

By the Master:

Q. Whose services? A. Mr. Boag's.

By Mr. Purcell:

Q. Now, do I understand you to say that you have no knowledge as to the truth of Boag's statement in that connection? Am I correct in stating that you have no knowledge as to whether it was a fact, or not? A. Well, no; I am telling what Boag said to me.

By Mr. Wykoff:

Q. Subsequent to that time you and I had some further negotiations, did we not? A. We had a lot of conversations. I don't know about negotiations.

Q. At least we talked with each other on the telephone on Saturday here in Cleveland? A. Friday.

Q. We talked with each other on the telephone on Friday, both during the day and during the evening? A. Yes; we did.

Q. And after Mr. Purcell left your office where did you go? A. I don't recall where I went. I stayed there a time, I think.

Q. Let me see if I can refresh your recollection. Wasn't that the day when you took Mr. Boag out to your home? A. Oh, at the end of the day?

Q. Yes. A. This was early in the afternoon. I think Mr. Boag came back to my office about 6:00 o'clock, 5:30 or 6:00 o'clock, and I took him to my home.

Q. And did Mr. Boag tell you where he had been in the meantime? A. Well, yes; I think that he had either talked to Mr. Purcell again or had been in Mr. Purcell's office. He told me that he had been out to—in the afternoon I think he told me that he had a meeting scheduled with Mr. Purcell at either 5:30 or 6:00 o'clock, some time late in the afternoon, and I think at that time Mr. Boag told me that Mr. Purcell said that he was going to give him some answer after talking to Mr. Young.

Q. When he came back to your office late that day, before you went home, had his position changed at all about the sale of his stock to Bradley and Murphy? A. Well, he was going to hear from Mr. Purcell again and he was determined that he wasn't going to take \$5,000 for his stock. He was going to take \$25,000 or more, or he wanted that.

Q. On the night of that day, which was Friday, did you and I have some conversation over the telephone

around about 10:00 or 11:00 o'clock in the evening? A. Yes; we did.

Q. As a result of which I came out to your house? A. That is right.

Q. And who was present when I came out there? A. Mr. Boag and I were there, and you came with Mr. Merrifield.

Q. That is right. Had I previously submitted to you a form of agreement for the sale of your stock and Mr. Boag's stock to Bradley and Murphy for \$100,000? A. Yes; you presented that to me on the train coming back from Chicago.

Q. I am handing you Young's Exhibit 26. I wish you would look at that and tell me whether or not, without the interlineations or changes, that is an agreement that I had first submitted to you for the purchase of your stock and Mr. Boag's stock for \$100,000? A. Well, I couldn't say positively. It looks like the agreement. I am pretty sure it is because it has all the terms in it that were recited in the other agreement which you wanted me to sign on the train coming home from Chicago.

Q. Now, let me ask you this: In the second line \$100,000 has been changed to \$115,000, and in the third line \$100,000 has been changed to \$115,000. Do you remember whether or not that was done at your home that evening? A. Those changes were made at my home that Friday evening.

Q. And also in the third line "payable \$5,000 cash" was changed to "payable \$25,000 cash," wasn't it? A. That is right.

Q. Was that done at your home that evening? A. That was.

Q. And then down here about seven or eight lines it is provided that the stock is to be delivered not later than Friday, March 6, but that has been crossed out and "Saturday, March 7," has been substituted? A. That is right.

Q. Was that likewise changed at your house? A. That is right.

Q. Now, down toward the bottom of the instrument, on the right-hand side, there is this language: "The cost thereof, however, to be paid by said Charles L. Bradley and John P. Murphy," and that is crossed out and ini-

tialed. Was that crossed out at your house that night? A. Yes; it was crossed out at my house at your instance.

Q. Now, that instrument was signed by you and was approved by William W. Boag? A. That is right.

Q. Now, the following day the balance of the consideration was paid to you, was it? A. That is right.

Q. And you turned over the shares of stock? A. Well, now, I turned over 250 shares of stock which stood in my name. Now—

Q. Mr. Boag had turned his stock over the night before? A. Did I have his stock?

Q. You had that stock the night before? A. I don't know whether it was taken up that night, or not.

Q. But Mr. Boag turned his stock over the night before? A. Yes; I guess that is right.

Q. And then do you recall that on the following morning, or do you recall that that night you received a check for \$75,000, or was it the following morning? A. I received a check that night for \$5,000 and Mr. Boag received a check for \$20,000.

Q. You received a check for \$5,000 and Mr. Boag a check for \$20,000? A. Yes.

Q. Then the following morning you received an additional check for \$75,000; is that correct? A. That is right.

Q. And then in addition to that you received the note of Messrs. Bradley and Murphy for \$15,000? A. That is right.

Q. Secured by the 250 shares of the first preferred stock which you had sold to them? A. That is right.

Q. Do you know when it was that Mr. Young purchased his preferred stock in The Higbee Company? A. No; I don't. At the time that we were getting ready to file our objections Mr. Purcell had prepared some objections for Mr. Young in which he recited that Mr. Young was a holder of, I think, 81 shares. That was in the fall of 1940.

Q. That was in October of 1940? A. That is right.

Q. And at least he represented to you at that time that in the fall of 1940 he was the owner of 80 some shares of stock? A. I think it was 81. I am not sure.

Q. When he purchased those you don't know? A. I have no idea.

Q. Did you ever have any negotiations with Mr. Bradley or Mr. Murphy, or anybody on their behalf, for the acquisition of your shares of stock or Mr. Boag's shares of stock prior to that long distance telephone talk that you and I had? A. That was the first offer and the first conversation.

Mr. Wykoff: I think that is all, your Honor.

CROSS EXAMINATION OF J. F. POTTS by Mr. Purcell.

Q. Mr. Potts, on May 14, 1942, when you were being interrogated with respect to your application for fees by Mr. Sherwood, Mr. Sherwood asked you these questions and you gave these answers, did you not:

“Question: Were there any other people interested in buying this stock at the time you sold it to Mr. Bradley and to Mr. Murphy?

Answer: No; I don't think so.

Question: Mr. Young wasn't interested?

Answer: Apparently not.”

Did you give that testimony? A. I did.

Q. Does that testimony state the fact? A. You bet it does. You had called up and said that Mr. Young was no longer interested in the purchasing of it, that he was going to try to intervene and stop the appeal being dismissed. I took that to mean that you were no longer interested.

Q. In stating, in substance, today that I said to you on the 6th of March that Mr. Young would meet any offer, do you recall my saying to you on that occasion that Mr. Young had been en route to Florida during all of that week and that I had not had any conversation with him during that week, after the 2nd of March? A. I don't recall whether you said that, or not, Mr. Purcell.

Q. Do you recall testifying that you recalled that I did at a hearing here? A. About him being en route?

Q. And that I had not had any conversation with him during that week? A. I don't recall it. If you say that you said it, you might have said it.

Q. And that I said I had no authority whatever in connection with any negotiations in respect of your stock? A. I think I have stated what was said, Mr. Purcell. You said—

Q. Wait a minute. A. I said that you used the words "We will meet any offer that you have received."

Q. Now, do you know— A. You said, "I will get in touch with Mr. Young. He is in Florida. He is at Palm Beach." I think you even mentioned the place where he was located.

Q. Don't you recall that I said that I had no authority whatever in the matter? A. No; I don't recall it because I don't think you would have said such a thing.

Q. You won't say that I did not say that? A. No; I don't know whether you said it, or not. I don't think you said it, Mr. Purcell. I think it was quite obvious that you didn't have any authority to mention figures because you said you would get in touch with him.

You said, "We will meet any offer that you receive," or "have received." Just whether you used the present tense or the past tense in that conversation I don't know.

Mr. Purcell: I have no further questions.

RE-DIRECT EXAMINATION OF J. F. POTTS by Mr. Wykoff.

Q. When was it that Mr. Purcell called and said that they were no longer interested in acquiring your stock?

Mr. Purcell: Wait a minute. There is no testimony that I ever said any such thing. Also that is a leading question.

Mr. Wykoff: I thought that is what he just said in response to your—

The Master: Ask him the question if he did so testify.

Q. Didn't you just so testify on cross examination?

The Master: Wait a minute. Ask him that question, Mr. Wykoff, if he did not so testify.

A. I will clear it up if you will give me an opportunity. That evening—

Q. Which evening? A. Of Friday, March 6, was it?

Mr. Purcell: Friday was the 6th.

A. Mr. Purcell called me and told me that he had talked to Mr. Young. He told me that Mr. Young was shocked to think of considering purchasing our stock, that

he wouldn't purchase it, wouldn't purchase Boag's stock, and that he was going to intervene as a preferred stock holder and see to it that the appeal was not dismissed in Cincinnati.

Q. What led to that conversation? A. He was to get in touch with—

Q. Who was? A. Mr. Purcell was to get in touch with Mr. Boag and whether or not he was to get in touch with me I don't know after he talked with Mr. Young to tell us what amount of money they would pay for the stock. That was his conversation, I think, with Mr. Boag. He couldn't reach Mr. Boag at Mr. Boag's home because Mr. Boag was at my home. So, he called me there and gave me the conversation, and then Mr. Boag called Mr. Purcell and he gave Mr. Boag the same story. I could hear a part of it because I stood very close to Mr. Boag, but I couldn't hear all of it. As to stopping the appeal, he also asked Mr. Boag not to do anything until the next day at noon, that he wanted to talk to him further about his stock.

Q. Now, that occurred Friday night, did it? A. Yes, sir. I would say that that took place about 9:00 or 9:30, or along in there some place.

Q. Out at your home? A. That is right.

Q. And that was before we had acquired your stock?

A. That is right.

Mr. Wykoff: I think that is all.

Mr. Arter: Bradley and Murphy rest.

Mr. Purcell: If the Court please, I would like to be sworn and make a statement here.

ROBERT W. PURCELL, being first duly sworn, testifies as follows:

DIRECT EXAMINATION OF ROBERT W. PURCELL.

Mr. Purcell: At the hearing before the Circuit Court of Appeals on the 11th of March I argued in support of the application for leave to intervene and to continue the appeal. The Court inquired of me with respect to some representations which had been made to it on the preceding day to the effect that Mr. Young had, at an earlier hearing before the Master, stated that he approved the plan and was all for it.

I outlined to the Court the situation with respect to that occurrence. In the latter part of May, or early June, of 1941, when Young and Kirby tendered to the Master the proof of claim in which they claimed an ownership of the junior debt there was a question as to whether or not that proof of claim should be permitted to be filed at that time. Conversations ensued between Mr. Gardner Abbott and Mr. Bulkley, representing Mr. Young, and as a result of those conversations an understanding was reached whereby Mr. Abbott stated that he would not object to the filing of the claim and the hearing on its merits in these proceedings if Young and Kirby would agree not to oppose the plan once they were permitted in the proceedings.

Messrs. Young and Kirby did make such an agreement and stated to the Master that if the application for leave to file the proof of claim was granted that we did not propose to come into the proceedings under those circumstances and file any objections to the plan.

I further stated to the Circuit Court of Appeals that we were greatly disappointed when Mr. Abbott, while not actively opposing the application for leave to file the proof of claim, did oppose its being granted until the final hearing on the plan which, in effect, deferred the hearing of that matter on its merits for many months.

Mr. Arter: Mr. Purcell, may I interject at this time so as to save a long cross examination afterwards?

That matter has since, however, been heard before this Court and finally determined, has it not?

Mr. Purcell: Well, not finally determined. It has been heard.

Mr. Arter: It has been determined by the Master, has it not?

Mr. Purcell: That is correct.

I further stated to the Court that such agreement with Mr. Abbott was made at a time when Mr. Potts was actively, industriously and whole-heartedly representing the interests of the preferred stock and that Mr. Young had no notion whatever that Potts would discontinue, for personal reasons, his representation

of the preferred stock; that under those conditions Mr. Young felt it entirely proper to assert his contention in the Circuit Court of Appeals.

I should also like to state that when Mr. Menzies came into the hall to announce that the Court had decided to permit the dismissal of the appeal and requested counsel to prepare the two journal entries, which have been marked Bradley and Murphy Exhibits 8 and 9, respectively, that he specifically requested counsel to omit any reason for the action of the Court as the Court had instructed him, Mr. Menzies, to convey that word to counsel. Now, going to the—

Mr. Arter: Mr. Purcell, do you mind if I interject this way?

Mr. Purcell: No. Go ahead.

Mr. Arter: You stated that when Mr. Menzies said that the Court had determined to permit the dismissal that Mr. Menzies further alluded to the fact that the Court had determined to refuse Mr. Young's application to intervene?

Mr. Purcell: That is correct, but Mr. Menzies' request to omit any reasons for the Court's action applied to both of those orders which the Court was about to make.

Mr. Arter: That is right.

Mr. Purcell: Now, going to the conversations which I had with Mr. Potts, I deny emphatically that I made any statement to Potts and Boag that we or Young, or anyone whom I was representing, would meet any offer which Potts and Boag had for the purchase of their stock.

Mr. Potts correctly stated the substance of the suggestions which I had made for the compromise of the litigation to permit dismissal of the appeal in the event that Young or his group should obtain the Higbee securities, which was that we were willing at that time, if we did obtain the securities, to amend the plan so as to reduce the amount of the junior notes which would have been issued in respect of the old junior notes and thus to subordinate a larger amount of the old junior debt to the interests of the preferred stock-

holders. That, it seemed to me, would have been fair to all stockholders.

Mr. Arter: Did you state that to him?

Mr. Wykoff: Is this an argument?

Mr. Purcell: Well, then, I will withdraw that.

On no occasion was the suggestion ever made by me that Young and Kirby would be interested in acquiring the Potts and Boag stock.

As I have testified before in these proceedings, on Friday afternoon, March 6, Boag was in my office and stated to me that he would be willing to accept \$15,000 for his ten shares of stock. Despite the fact that our acquisition of the Boag stock could have prevented the dismissal of the appeal, we were unwilling, and I so stated to Boag, even to make the payment of that relatively small amount involved.

I deny furthermore—

Mr. Arter: May I interject?

Mr. Purcell: Sure.

Mr. Arter: It will save going back later. Did you send for Boag to come to your office?

Mr. Purcell: I did not.

Mr. Arter: You had never had any dealings with Boag before, had you?

Mr. Purcell: He had been in my office two or three times in the past, in the preceding year.

Mr. Arter: All right. Go ahead.

Mr. Purcell: Mr. Boag came to my office and indicated that he would much prefer to deal with Young than with Bradley because Bradley had been out to see Mrs. Shiverick in an effort to have Boag dismissed from Mrs. Shiverick's employment.

Mr. Arter: If I may interject, he was a butler, was he not?

Mr. Purcell: I believe so.

Mr. Arter: That is all.

Mr. Purcell: I deny emphatically that we ever offered Boag anything for his stock and the suggestion that we offered \$25,000 of new notes is likewise false.

Mr. Arter: May I interject there?

Mr. Purcell: Yes, sir.

Mr. Arter: Did you ever have any talk with Boag at or about that time about giving him a job?

Mr. Purcell: No, sir.

Mr. Arter: That is all.

Mr. Purcell: I might say this: In that connection, if my recollection serves me correctly, some general remark was made by Boag to the effect that if he refused to permit the dismissal of the appeal he would expect that Mr. Young would remember him in some way in the future.

Mr. Arter: What did you say to that?

Mr. Purcell: I said, of course, that I couldn't make any commitment in that connection, but that knowing Mr. Young as I did I felt that there was some chance that Young would probably remember his friends. That was the sum and substance of it. No suggestion as to a job was ever made.

I deny, furthermore, that I made any statement to Potts and Boag that Young intended to put propaganda on the street to prevent Bradley and Murphy from financing the payment of their note.

Mr. Arter: May I interject there?

Mr. Purcell: Yes.

Mr. Arter: Young did, did he not?

Mr. Purcell: No.

Mr. Arter: He put advertisements in the Cleveland papers and in the New York papers that he would hold anybody responsible who assisted them to finance?

Mr. Purcell: Well, he put certain notices in the papers. I didn't say that that was propaganda.

Mr. Arter: They were paid advertisements, were they not?

Mr. Purcell: My testimony was that I deny that I made any such statement to Potts. It is a fact that certain notices were printed in the papers.

Mr. Arter: And paid for?

Mr. Purcell: The notice in the Cleveland paper was not paid for.

Mr. Arter: But you offered to pay for it and they refused to take your money? That is it, isn't it?

Mr. Purcell: That is not true.

Mr. Arter: Didn't you so testify before Judge—

Mr. Purcell: I did not. I did not.

Mr. Arter: Before Judge Newcomb didn't you testify that—

Mr. Purcell: I did not.

Mr. Arter: Didn't you testify that you went down there expecting to pay for it, and they took it as a news item instead of a paid advertisement?

Mr. Purcell: That wasn't what your question was. They didn't refuse to take it.

Mr. Arter: But they refused to take your money, did they not?

Mr. Purcell: No; they did not.

Mr. Arter: Did you offer it?

Mr. Purcell: I did. I will tell you what happened, Mr. Arter, if you want my testimony on that. I tendered a statement and I tendered a check.

Mr. Arter: That is all right now.

Mr. Purcell: It was too late in the afternoon to get it into the paper as a paid advertisement. They ran it as a news item and they called me the next day and asked if I still wanted it as a paid advertisement. I said, "No."

Mr. Arter: But you did pay for the advertisements in the New York papers?

Mr. Purcell: I have no knowledge as to that.

Mr. Arter: And that was an advertisement to the general effect that—I can't give the exact words at the moment, but—

Mr. Purcell: I think, if the Court please, that if they want to put the advertisements into the record, I am agreeable to it, but—

Mr. Arter: Do you have one here?

Mr. Purcell: I have not.

Mr. Arter: We haven't one here either.

Mr. Purcell: I don't think it is material anyhow. I think it has no bearing in this controversy.

The Master: Is there anything further, gentlemen?

Mr. Purcell: That completes the statement which I want to make at this time, if your Honor please.

The Master: Is there anything else to be introduced by Messrs. Bradley and Murphy?

Mr. Arter: No. I understand that these papers that we have offered have been admitted.

Mr. Purcell: No; not all of them.

The Master: Are they objected to?

Mr. Purcell: Yes; they are objected to.

Mr. Arter: Which ones?

Mr. Purcell: I object to Bradley and Murphy Exhibit No. 2.

The Master: Which is what?

Mr. Purcell: Generally speaking, if the Court please—

The Master: What is it?

Mr. Purcell: I object to the introduction of briefs which they filed in the Circuit Court of Appeals on the ground that they are self-serving declarations, not binding upon us. They are simply briefs—

Mr. Arter: We will state to the Court that the only purpose of presenting them is to acquaint this Court with the matter that was before the Court and the arguments that were made to the Court.

The Master: I will receive them subject to objection the same as in any other hearing before a Master. All exhibits are received subject to the objection because, of course, this matter finally has to go before the District Court and everything should be there so that the District Judge can pass upon it.

Mr. Arter: But I do wish the record to show that the purpose of introducing them is to acquaint the Court with the matter that was before the Circuit Court of Appeals.

The Master: I understand that. Gentlemen, we have to receive them to get them into the record, so that the District Court will have a complete record of what was offered, and they will be received on that basis, subject to the objection, and you may have your exception.

Mr. Purcell: May I state my objection?

The Court: Yes, sir.

Mr. Purcell: I object to the introduction of Bradley and Murphy Exhibits 2 and 4 for the reason that they are briefs prepared by counsel for Bradley and Murphy, are self-serving statements, are not verified,

no opportunity has been had to examine with respect to them, and that it is highly improper to introduce that type of exhibit, not binding upon Young or any of the other preferred stockholders.

The Master: You may have your objection and exception. They will be entered.

Mr. Potts: If your Honor please, I would like to ask Mr. Purcell a few questions.

CROSS EXAMINATION OF ROBERT W. PURCELL
by Mr. Potts.

Q. Mr. Purcell, when you called me and talked to me about meeting an offer and getting the appeal dismissed in case Mr. Young obtained certain notes and these securities, did we have any conversation about how we were to be compensated in case we worked out some deal whereby some of the junior debt would be foregone in lieu of common stock to Mr. Young? A. I believe that I suggested to you that under those circumstances I felt that you would be entitled to file an application for compensation in the reorganization proceeding and I thought that probably the Court would allow it.

Q. Anything else? A. Not that I recall; no.

Q. You don't recall of saying that there would be a place in The Higbee Company for me if we got rid of Bradley and Murphy? A. I do not recall any such statement.

Q. Well, would you say that there wasn't any such conversation? A. It seems to me that there might have been conversation. I don't say that there was because I can't remember, but I do remember that there was in my own mind the possibility that you as a preferred stockholder and representing other preferred stockholders might appropriately be a member of the Board of Directors of The Higbee Company.

Now, whether we discussed that, or not, I couldn't be certain, but I won't deny that we discussed that. I deny that we went any further than that.

Q. Do you recall that I told you at the time that all the stockholders excepting Boag had deserted me in the appeal and that I expected compensation for the work that I had done, and that Boag was entitled to something

for the work that he had done? A. I think that you stated that in words or in substance.

Q. Did you agree that that would be part of the negotiations, that we would be taken care of? A. No, sir.

Q. Now, you say that you deny saying that Mr. Young or we will meet any offer received by you for your stock? A. I certainly do.

Q. What was said about the offer that we had and the consideration that you were giving that situation as it appeared to you at that time or that day?

The Witness: May I hear that question?

(Question read.)

Q. I am talking about the offer from Mr. Bradley and Mr. Murphy. A. Well, that conference didn't last very long. I recall that you stated to me that you had a substantial offer; you didn't indicate how much that offer was, but you stated to me that you would communicate it to Boag and that Boag, if he cared to, could later call me up and tell me what it was, which Boag did, although I, apparently, misunderstood him over the telephone.

Q. When Mr. Boag told you that amount what did you tell Mr. Boag that you were going to do? A. I don't recall that I told him anything. I had indicated to you and to Boag that I expected to call Mr. Young later that day on long distance telephone.

Q. For what reason? A. To advise him of the developments which were taking place. I felt that this was a matter of importance, that things were happening pretty fast and furiously those days, and I felt my obligation to give him the story.

Q. Do you say that you never made Mr. Boag any offer for his stock independent of mine? A. Never.

Q. Never mentioned these notes of Higbee in payment of such stock, if you purchased it? A. Not that I can recall. It was never suggested that we purchase his stock.

Q. How did you happen to come to my office that day? A. Mr. Boag dropped in at my office out of a clear sky that morning, probably about 11:00 o'clock. I didn't invite him in and I wasn't expecting him. On that occasion he told me that Bradley and Murphy were having negotiations, but that he preferred to play along with Mr. Young

because Bradley and Murphy had tried to have Boag fired from his employment with Mrs. Shiverick.

Mr. John P. Murphy: Do you include Murphy in there?

Mr. Purcell: I beg your pardon. I understand it was Bradley. I don't know whether Mr. Bradley did, or not, but I am simply reporting to you what Boag said to me.

Q. You called me and asked if you could meet me in my office with Boag for a conference on the matter? A. Boag invited me to come over to your office.

Q. But you called me? A. And I said to Boag, "Well, I don't want to go over there unless I am welcome over there."

Mr. Boag said, "Well, call Potts up and see if it is all right."

So, I did, and you said it was all right. You said, "Come on over." Is that correct?

Mr. Potts: That is all.

Mr. Wykoff: I have two or three other questions that may eliminate putting in any further evidence.

CROSS EXAMINATION OF ROBERT W. PURCELL
by Mr. Wykoff.

Q. When was it that the Shaker Heights & Terminal, or the Terminal & Shaker Heights, Realty Company acquired the Bradley and Murphy note which was originally payable to the Ball Foundation? A. March 2, 1942.

Q. And that was acquired as the result of litigation that Mr. Young and Mr. Kirby had then pending against the Ball Foundation? A. That is correct.

Q. And Mr. Young, as a result of those negotiations, nominated the Terminal & Shaker Heights Realty Company as the recipient although it was not a party to the litigation? A. That is not quite correct. That note was taken into the Terminal & Shaker Heights Realty Company on account of the decision which had been rendered by the Circuit Court of Appeals in the Van Sweringen Company case which, in effect, had deprived the Terminal & Shaker Heights Realty Company of certain assets which belonged to the Ball Foundation which represented that it

owned at the time of the sale of the stock of the Terminal & Shaker Heights Realty Company to Young and Kirby. Thus, it was a restoration of assets, not exactly in kind, but, as nearly as possible, in kind as we could make it, for those assets which we thought the company owned, but which it really didn't own after we had a lot of litigation on the matter.

Q. Well, the Terminal & Shaker Heights Realty Company was a party to that law suit against the Ball Foundation, was it not? A. No; that law suit was instituted with the Terminal & Shaker Heights Realty Company as the intended beneficiary.

Q. But it was not a party? A. It was not named as a party.

Q. Now, you acquired it on March 2. When was it that you declared the note due and notified Bradley and Murphy that you were going to sell the collateral? A. We sent notices under date of March 3.

Q. When was it that the Terminal & Shaker Heights Realty Company filed its claim in these Higbee reorganization proceedings claiming that it was the beneficiary of a constructive trust with respect to the Higbee securities? A. I don't have the date here, but I suppose the record shows it. I would guess it was along about the 10th of April or somewhere along in there.

The Master: April?

The Witness: April of 1942.

The Master: That date can be ascertained from the record.

The Witness: I am willing that it should be supplied.

Q. April of 1942 is close enough. In any event, it was after you had gotten the note? A. Exactly.

Q. Now, on March 11, 1942, the Terminal & Shaker Heights Realty Company refused the tender made by Bradley and Murphy, refused the money that was tendered by Bradley and Murphy; is that correct? A. I think that is not correct. I think it was March 12.

Q. March 12? A. Yes.

Q. Very well. A. Because March 11 we were down in Cincinnati.

Q. Now, are you willing to have made a part of the record here as Bradley and Murphy Exhibits 10, 10-A, 10-B and 10-C, the newspaper notices which were printed as a result of your conferences with the Cleveland newspapers, to which you have testified, with respect to notifying the people that you would hold them responsible if they aided Bradley and Murphy? Can those be put in as Bradley and Murphy Exhibits 10, 10-A and 10-B?

The Master: They are already in the record.

Mr. Arter: No.

The Master: They are not in this record, but they are in the record of the Higbee proceedings.

A. Do you mean that there are four of them?

Q. There are three of them. A. I don't think there are.

Q. Well, two or whatever there are.

Mr. Purcell: I have no objection other than this, if the Court please: I don't think that they are material or relevant in this matter.

The Master: That is just the same situation as we had before. You may object to them, but they will be received subject to the objection, and they will be included in the record of this hearing, if it is desired.

You may save your objection and exception.

Q. Now, prior to the hearing before the Special Master on your claim filed on behalf of both Young and Kirby and the Terminal & Shaker Heights Realty Company you took depositions of both Messrs. Bradley and Murphy over several days, did you not? A. Mr. Bradley wasn't well and we postponed his deposition from time to time so that he wouldn't have to testify too long at any one time.

Q. But those sessions required many days? A. Oh, yes. However, I think Mr. Murphy's deposition took only about an hour or two on one day.

Q. But, in any event, the depositions that you took of Messrs. Bradley and Murphy covered a period of as much as ten days, didn't they? A. As I say, we took Mr. Bradley's deposition on numerous days, but we were only taking it for maybe an hour each day, and that was out of deference to Mr. Bradley's health. I deny any inference that we were prolonging the deposition for any—

Q. But they were extensive depositions? A. Yes; they were thorough.

Q. Now, in addition to that you took depositions in Washington of a former Vice-President of The Metropolitan Life Insurance Company? A. Yes.

Q. And you did not file those depositions or offer them in evidence? A. That is right.

Q. And in addition to that you went to Indianapolis and took the depositions of Mr. Ball and Mr. Bernard? A. Yes.

Q. And you didn't file those depositions? A. That is correct.

Q. Why didn't you offer those depositions? A. They were discovery in nature. We were seeking information.

Q. Well, now, are you willing to testify that they didn't testify to substantially everything that was testified in the depositions which you took in Indianapolis in various depositions that you had previously taken in litigation between Mr. Young and the Ball Foundation? A. Oh, yes; we never took Mr. Bernard's deposition in any of our other litigation.

Q. Well, as a result of the interrogatories that you directed to them they answered substantially every question that you asked, didn't they? A. No.

Mr. Wykoff: Very well.

The Master: Is there anything further?

Mr. Potts: If your Honor please, I don't want to make a speech, but I do want to go on record as opposing this application for the reasons that there are no grounds existing for such a lawsuit and even if grounds did exist there is no provision under any such proceeding as this to take care of such a lawsuit.

I don't want it to appear here that Bradley and Murphy are the only persons opposing this application. I want it made clear that I am opposing it.

Mr. Wykoff: You gave me at one time a list of Mr. Young's purchases of preferred stock of The Higbee Company. Could you supply that list again so that it can become a part of this record?

Mr. Purcell: Yes; I believe I can find that.

Q. Do you also know whether or not Mr. Young is a stockholder of record of The Higbee Company now? A.

Generally speaking, his securities are held in the names of nominees, but I don't know whether that is the case in this instance, or not. I am willing to state for the record that he now owns the Higbee preferred and anything which he has received, or will receive, as a distribution with respect to the 138 shares of old first preferred stock which he owned.

Q. But the 138 shares were kept in his name, as I understand it; is that right? A. That is correct. He was the owner of the shares.

Mr. Wykoff: I think that is all, your Honor.

(Legal Notice, Cleveland Plain Dealer, March 5, 1942, and newspaper items, marked Bradley and Murphy Exhibits 10-A, 10-B, and 10-C, respectively.)

(Western Union Telegram, 3-9-42, Securities and Exchange Commission to A. W. Menzies, Clerk, United States Circuit Court of Appeals, marked Bradley and Murphy Exhibit 11.)

(Tabulation, First Preferred Stock, The Higbee Company, purchased by Robert Young, marked Bradley and Murphy Exhibit 12.)

Mr. Arter: We rest.

The Master: Very well, then.

Mr. Purcell: Do you want briefs on this matter?

The Master: I think so. I think we should have them. You may file your brief first and then they will file an answer.

Off the record.

(Discussion.)

(At 12:55 P. M. the hearing was adjourned.)

BRADLEY AND MURPHY EXHIBIT 1.**Application of Robert R. Young for Leave to Intervene and Appeal.****UNITED STATES CIRCUIT COURT OF APPEALS
SIXTH CIRCUIT.**

No. 9,148.

J. FRED POTTS,
WILLIAM W. BOAG,*Appellants,*

vs.

THE HIGBEE COMPANY,

Appellee.

APPLICATION FOR LEAVE TO INTERVENE AND APPEAL.

Now comes the intervening petitioner Robert R. Young the holder of one hundred and thirty-eight (138) shares of first preferred stock of The Higbee Company and respectfully represents to the Court that he is informed that the preferred stockholders presently prosecuting the appeal from the re-organization of said Company are planning to withdraw their appeal because of certain considerations received from the management.

Your petitioner further represents upon behalf of himself and the other first preferred stockholders of said company that they will suffer irreparable loss if said appeal is dismissed and accordingly respectfully asks the Court for a hearing in the within cause before any action is taken on said appeal.

.....
Attorneys for Robert R. Young.

STATE OF OHIO,
HAMILTON COUNTY, ss:

Paul C. Kunkel being first duly sworn deposes and says that he is a member of the firm of Kunkel & Kunkel, Attorneys for the intervening petitioner herein; that said intervening petitioner is a non-resident of this County;

and that the statements contained in the foregoing application are true as he verily believes.

.....

Sworn to before me and subscribed in my presence
this ... day of March, 1942.

.....

*Notary Public in and for
Hamilton County, Ohio.*

BRADLEY AND MURPHY EXHIBIT 2.

Memorandum Opposing Application for Leave to Appeal.

(Case No. 9148, U. S. C. C. A. 6—caption omitted.*)

Robert Young has no standing to seek to intervene in this case. He was not a party below and is not a party in this court. In the trial court he disclaimed, through his attorneys, all opposition to the plan of reorganization. He rejected invitation of counsel for appellants to join in opposing the reorganization plan. Since appellants and appellee have joined in stipulation for the dismissal of the appeal, Young, as a stranger to the record, has no right to resist it. Especially is this true where as here the attempt is made to keep the appeal alive for ulterior purposes.

Respectfully submitted,

.....

*On Behalf of Counsel for Appel-
lants and Appellee.*

*** PRINTER'S NOTE:**

The captions appearing on the original Bradley and Murphy Exhibits 2-9, incl., being substantially the same as that on Bradley and Murphy Exhibit 1, *supra*, have been omitted to avoid duplication.

BRADLEY AND MURPHY EXHIBIT 3.**Memorandum in Support of Application of Young
for Leave to Intervene and to be Heard.**

(Case No. 9148, U. S. C. C. A. 6—caption omitted.)

Applicant is a holder of 138 shares of the First Preferred Stock of The Higbee Company, a corporation being reorganized under Section 77B of The Bankruptcy Act and Acts Amendatory thereof, the reorganization proceedings pending in the United States District Court for the Northern District of Ohio, Eastern Division from whose order this appeal is taken.

Appellants Potts and Boag are also holders of Preferred Stock who objected to the Plan of Reorganization of Higbee upon three grounds: First, that a large unsecured indebtedness of Higbee represented by subordinated notes in the principal amounts of \$1,292,534.74 and \$258,506.94 was in truth and in fact a contribution to the capital of that corporation at the time the advances were made to Higbee by The Cleveland Terminals Building Company, the then owner of all of Higbee's outstanding common stock. Second, in the alternative that the claims on the notes should not be allowed for more than \$100,000 that being the amount paid for said notes by one Midamerica Corporation at the famous Morgan auction sale in 1935. (This Court has heretofore had occasion to scrutinize said auction and has found that certain securities there purchased were held in trust for debtor corporations, in re *The Van Sweringen Co., etc.*, 119 F. (2) 231.) Third, that in no event should the claims be allowed for more than \$600,000 that being the amount which one Charles L. Bradley and one John P. Murphy agreed to pay for them at a time when said Bradley was a director of Higbee.

The Plan of Reorganization provides for a substantially larger participation and distribution to be made in respect of the notes than would be made were any of the objections of Potts and Boag sustained.

Applicant is informed that the said Bradley and Murphy have concluded an arrangement with Messrs. Potts and Boag individually whereby they will pay to Potts and Boag a substantial sum of money (reported to be \$150,000) if the said Potts and Boag will withdraw their appeal from the order of the District Court approving the Higbee Plan.

Thus, the many other Preferred Stockholders of Higbee will be deprived of the right to have this Court review and pass upon the validity of the objections which have heretofore been made. The very fact that a deal has been made at the reported figure of \$150,000 indicates the gravity and apparent validity of the objections, and demonstrates more clearly than any argument on our part that the questions heretofore presented by Messrs. Potts and Boag should receive this Court's full attention.

It is interesting to also note that The Higbee Company, debtor, recently filed a motion to dismiss the appeal on certain technical grounds. On that occasion the motion was vigorously opposed by Potts and Boag resulting in its denial. Now, a few short weeks later, Potts and Boag are consenting to the dismissal. We urge upon the Court that these facts invite scrutiny.

Potts and Boag have been appealing upon the ground that the treatment of Preferred Stock provided by the Higbee Plan is unfair to all Preferred Stockholders similarly situated, of which this applicant is one. The situation is analogous to a class action or stockholders' suit. In this type of action the wrongful practice has unfortunately developed whereby defendant directors purchase the dismissal of the suit of a single stockholder by making him a substantial payment in which other stockholders do not participate, and thus avoid litigation of the rights of all stockholders. This evil has long been recognized as such by the courts, and where detected has always been disapproved. Rule 23 (c) of the Rules of Civil Procedure for The District Courts requires that the dismissal or compromise of any such class action shall only be with the approval of the Court. Obviously, this rule contemplates the fair and equitable treatment of all stockholders as a prerequisite to any such dismissal.

In the prosecution of their objections Messrs. Potts and Boag have clearly been acting in a representative capacity. Thus in their reply brief on this matter when the same was pending in the United States District Court during the summer of 1941 they state:

"SECOND, it has been stated that objectors own and therefore represent only 260 shares of Higbee First Preferred. While we believe that the owner of a

single share has as much right to be heard as the owner of many shares, we wish to point out to the court that objectors were originally members of the New Preferred Stockholders' Committee; that objectors resigned from said committee in protest over the unauthorized action of its counsel in approving this Plan. The representation which said New Preferred Stockholders' Committee now claims was acquired mainly through the presence on such Committee of Messrs. Potts and Boag, the present objectors, and it is now a fact that a very large proportion of the stockholders which the New Preferred Stockholders' Committee claims to represent actually look to these objectors for the protection of their interest. The two remaining members of that committee are the owners of 10 shares of Preferred Stock each."

Clearly at the time the foregoing brief was submitted Messrs. Potts and Boag considered themselves as acting in a representative capacity and so stated to the Court.

Since this Court on January 13, 1942 overruled the motion of the debtor to dismiss the appeal of Messrs. Potts and Boag and since it is apparent that that appeal was not personal to them but for the benefit of all Preferred Stockholders, this Court should now refuse to permit the Preferred Stockholders to be left without the opportunity of having the Higbee Reorganization Plan reviewed as would be the case if the request for dismissal by Messrs. Potts and Boag is sustained and no other intervener is supplanted in their place.

In the instant case the only shareholders who are to benefit are Messrs. Potts and Boag whose dismissal of this appeal is being purchased by persons interested in having the Plan approved according to its present terms. If it is worth \$150,000 to cause this appeal to be terminated, then that sum should go to the benefit of all Preferred Stockholders and not just the two whose names appear in this matter as appellants.

Applicant ~~as a~~ Preferred Stockholder has not entered this proceeding prior to this time as Potts and Boag were presenting the objections, and duplication of appeals would have been unnecessary and would have unduly imposed upon the time of the Court.

Applicant stands ready at his own expense to continue this appeal in the interests of all Preferred Stockholders to the end that there may be an adjudication of the fairness of the Plan that is now sponsored by the debtor. This applicant therefore respectfully requests that he be permitted to intervene and prosecute this appeal, or that he be substituted for appellants herein, and that he be granted an oral hearing in order that he may demonstrate to the Court the justice and fairness of his position and the evil which will result from a denial of the application and the attendant dismissal of the present appeal.

Respectfully submitted,

PAUL KUNKEL (s)

ROBERT J. BULKLEY (s)

JAMES A. BUTLER (s)

*Attorneys for Applicant
Robert R. Young.*

March 10th 1942.

Copies of the foregoing brief served by mail this 10th day of March, 1942, upon the following:

JONES, DAY, COCKLEY & REAVIS,

Union Commerce Building,
Cleveland, Ohio,

Attorneys for Debtor.

J. F. POTTS, Esq.,

Auditorium Bldg.,
Cleveland, Ohio,

*Attorney for J. F. Potts and
W. W. Boag.*

McKEEHAN, MERRICK, ARTER & STEWART,

Terminal Tower,
Cleveland, Ohio,

Attorneys for Bradley and Murphy.

KUNKEL & KUNKEL,

Attorneys for Applicant.

BRADLEY AND MURPHY EXHIBIT 4.**Memorandum Opposing Application of Young
for Leave to Intervene.**

(Case No. 9148, U. S. C. C. A. 6—caption omitted.)

Appellants and Appellee, having entered into a stipulation for dismissal of this appeal, are met with an application on the part of Robert R. Young, a stranger to the record, for leave to intervene. The application should be denied because:

*1. The Rules of This Court Provide for
Dismissal as a Matter of Right.*

Under the rules of this court the parties to this appeal are entitled to have a dismissal entered. Rule 19, paragraph 8, of the rules of this court reads as follows:

“Whenever the appellant or petitioner and appellee or respondent in a proceeding pending in this court, shall, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed and specifying the terms on which it is to be dismissed, as to costs, and shall pay to the clerk any fees that may be due to him, *it shall be the duty of the clerk to enter the case dismissed*, transmit forthwith a certified copy of the agreement to the lower court, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court. No attorney’s docket fee shall be taxed in a case dismissed under this rule.”

This rule has been in effect since January 1, 1940. Young not only took no objection to the reorganization plan in the trial court, but took no appeal. He knew that an appeal was taken by Potts and Boag acting only for themselves and was charged with the knowledge that under this rule the appeal so taken might at any time be dismissed by agreement of the parties thereto.

In reliance on this rule the parties have composed their differences. They have complied with the rule. Their right to dismissal would, therefore, seem to be clear.

This is particularly clear in view of the fact that the parties to this proceeding had complied with the rule and

thus became entitled to dismissal thereunder before Young had even tendered his application for leave to intervene.

2. *Young, Being a Stranger to This Record,
Has No Right Now to Interrene.*

Young was not a party in court below. He is not a party here. He has, therefore, no standing before this court. The general rule is thus stated in 2 *Ruling Case Law*, page 69, Section 51, that:

“In a proper case new parties may be substituted in the appellate court, as where the interest in the subject matter of the suit has been transferred, or where a party dies pending an appeal. In the latter event the personal representative heir, or successor in interest of the party may as a general rule be substituted. *Where, however, no succession of interest has taken place, third persons have no right to be substituted as parties appellant. Thus, though a suit purports to be brought by the plaintiff in his own behalf, and in behalf of other taxpayers and citizens of a city, other taxpayers are not entitled, pending an appeal, to be substituted as parties in place of the plaintiff. The same is true of a trustee in bankruptcy who fails to intervene in the trial court in a proceeding brought by the bankrupt before the proceedings were taken against him, and such trustee has no right to take such a proceeding for the first time on appeal.*”

The same rule is re-stated in 2 *Am. Juris.*, page 994, Section 244.

If that be the rule which applies where the appeal is lodged not only on behalf of an individual litigant but on behalf of others similarly circumstanced as a class, it would seem to be perfectly clear that the same rule must apply where, as here, the appeal is on behalf of appellants individually, *and is in no sense a class action.*

In 8 *Hughes, Federal Practice*, Section 5572, page 119 it is likewise pointed out that:

“Although an omitted appellee may be brought in by amendment of the citation, or by voluntary appearance, to allow a necessary party to join as appellant would be to grant him, in effect, an appeal after the

expiration of the time for taking an appeal. So the defect of the nonjoinder of a necessary appellant is not one which may be cured by amendment after the statutory time for appeal has expired."

Clearly Potts and Boag had the right to take their own appeal without joining or representing any other creditors or shareholders. This is specifically authorized under rule 74 of the Federal Rules of Civil Procedure which says:

"Parties interested jointly, severally, or otherwise in a judgment may join in an appeal therefrom; or without summons and severance, any one or more of them may appeal separately or any two or more of them may join in an appeal."

The rule has been adopted as a rule of the Sixth Circuit Court of Appeals. Rule 10.

Essentially the same situation as is here presented came before the Court in *Hight v. Batley* (1903) 32 Wash. 165, 72 Pac. 1034, 98 Am. St. Rep., 851. There, after the appeal had been perfected (p. 851):

"the parties entered into a stipulation whereby it was mutually agreed that the respective appeals should be withdrawn and that neither appeal should be further prosecuted."

The suit was by plaintiff in his own behalf and in behalf of other citizens and taxpayers of the city. After the stipulation for dismissal was filed (p. 851):

"Robert J. Huston and Hattie E. Huston, his wife, as taxpayers and property owners of the city of Ballard, moved this court for an order either substituting them as plaintiffs and appellants in the cause, or permitting them to intervene as plaintiffs and appellants, and to prosecute the said appeal heretofore taken by said A. W. Hight."

The motion was made upon the theory that the questions involved in the suit were common to all taxpayers of the city (p. 851):

"and that the plaintiff, in bringing his action, was litigating and waging public questions, in which all the

taxpayers of said city were similarly interested. It is, therefore, urged that the movers in this motion, as taxpayers in said city, are entitled to intervene or be substituted as parties plaintiff and appellant for the purpose of prosecuting said appeal inaugurated by the plaintiff in the action."

The court denied intervention. Reviewing the cases relied upon to sustain intervention, the court said (p. 852):

"We have examined the cases cited to support the above, and find that they were cases where a transfer of interest in the subject matter involved had occurred after the trial below, either by actual assignment or by operation of law. The substitution was therefore permitted in behalf of the real party in interest as successor of the original owner. There has, however, been no change of ownership of interest here. These moving parties have acquired no greater interest in the subject matter involved than they possessed at the time the action was commenced below, and no succession of interest has taken place. The authorities above referred to as being cited to support a substitution in the appellate court 'in a proper case' being wholly unlike this case, we are of the opinion that this is not a proper case for such substitution."

The Court pointed out further that allowance of intervention, the time for appeal having passed (as it has here), would be the equivalent of enlarging the time for appeal. As the Washington Court said (p. 853):

"We know of no statutory authority under which a new notice of appeal or a new appeal bond could be entertained by this court at this time. The appeal cannot be prosecuted by these applicants under the former bond given by the plaintiff, since it is conditioned only to pay costs and damages that may be awarded against the plaintiff himself on the appeal. This is conceded by the movers, inasmuch as they ask leave to file a new bond; but for the reasons stated we think such a bond would be ineffectual, and that they would have no appeal that could be prosecuted here, even if they should be formally substituted as appellants."

In *Cooper v. Ferguson Willis Oil Co. et al.* (1928 Ind.) 161 N. E. 4, under comparable circumstances, the court declared as set forth in the syllabus:

"In action in which receiver for defendant corporation was appointed, where only plaintiff appealed from judgment setting aside appointment of receiver, receiver and stockholders, not assigning cross-errors, may not object to plaintiff's subsequent dismissal of appeal merely because dismissal would work hardship on such stockholders and receiver."

Young knew about these proceedings from the start. Through his lawyer he attended the hearings leading to the orders appealed from. He took no steps to record objection to the reorganization plan. It is too late to do so now. This alone would be enough to require denial of the application as was pointed out in *Thomson-Houston Electric Co. v. Western Electric Co.* (2 C. C. A. 1907) 158 Fed. 813. Leave to intervene in a patent case was sought. The Court denied intervention, saying (p. 813):

"The petitioner was fully informed of the pendency of this action, and declined an opportunity to intervene when the case was pending in the Circuit Court."

The comment of the Court in *American Baptist Mission Soc. v. Barnett, et al.* (2 C. C. A. 1928) 26 Fed. (2d) 350, particularly at pages 352-3, although dealing with the subject of severance on appeal would also appear to be applicable.

CONCLUSION.

Young is without standing to come before this Court. He is a stranger to the cause. The parties of record having entered into a stipulation for dismissal of the appeal, Young's application should be denied forthwith and the appeal dismissed pursuant to the stipulation.

Respectfully submitted,

March 9, 1942.

BRADLEY AND MURPHY EXHIBIT 5.**Memorandum of Debtor.**

(Case No. 9148, U. S. C. C. A. 6—caption omitted.)

The Higbee Company, Appellee herein, has signed a stipulation for the dismissal of the appeal taken by J. Fred Potts and William W. Boag from the order confirming the Plan of Reorganization in the above entitled proceedings and has not been formally notified of any attempt to revive this appeal or to intervene in these proceedings in this Court by any other party. It has discovered, however, that an application for one or both of these purposes has been filed in this Court by Robert R. Young; and, because of its compelling interest in the speedy effectuation of the Plan of Reorganization heretofore confirmed by the District Court for the Northern District of Ohio on the recommendation of the Special Master, The Higbee Company opposes such application for the following reasons:

1. Robert R. Young, (hereinafter called the "Applicant"), is not shown by the record on this appeal to be a party to these proceedings; and, in fact, on June 12, 1941, the Special Master entered an order, a certified copy of which is hereto attached as "Exhibit A" and made a part hereof, on the application of said Robert R. Young and others to file a proof of claim in these proceedings, postponing the determination of said application until final order with respect to the Plan of Reorganization.

2. As appears from the printed record, the sole appeal herein was taken by J. Fred Potts and William W. Boag, and no appeal was taken by the said Robert R. Young or anyone in his behalf. The order confirming the Plan of Reorganization was entered by the Court below on October 17, 1941, and the period within which to appeal therefrom has therefore expired. The Appellants, as appears from their stipulation filed in this Court, now desire to dismiss, and have in fact dismissed their appeal. This appeal was taken by them individually and not in behalf of any class of security holders; and the Applicant has therefore no greater standing than any other holder of any security of the Debtor, who either consented to or failed to appeal from the confirmation of the Plan and who, having sat by until the appeal period had expired, might now seek

to revive and have the benefit of the rights of the Appellants who no longer desire to assert them.

The rule is stated as follows in 2 *American Jurisprudence* 995, "Appeal and Error" Section 244:

"Where, however, no succession of interest has taken place, third parties have no right to be substituted as parties appellant."

Heights vs. Batley et al., 32 Washington 165, 72 Pacific 1034 (1903) is to the same effect, as is *Cooper vs. Ferguson Willis Oil Co. et al.*, 161 N. E. 4, (Indiana Supreme Court, 1928).

The reason for the rule is clear. The standing of the Applicant here does not differ from that of the holder of any other class of securities of the Debtor. If this application is to be entertained no reason appears why the application of any other security holder, at least if made within the term and perhaps even thereafter, might not result in a revivor of the appeal after its ostensible dismissal by the party who took it. If this rule were to prevail, an indefinite period would have to elapse before the Debtor, or the lower court, could with confidence go about the distribution of new securities and other steps necessary to effectuate the Plan of Reorganization.

3. As appears from the opinions of the Court below at pages 207 and 229 of the record an overwhelming majority of the security holders of the Debtor approved the Plan which the Court below confirmed; the Securities and Exchange Commission did likewise; and the sole exceptions thereto were taken by the Appellants herein, who now desire to dismiss their appeal. Since all the parties to this record are now in agreement, it is obviously to the interest of the Debtor that its Plan of Reorganization be consummated and put into effect as rapidly as possible to the end that the charges incident to the reorganization may be quickly terminated, and the Debtor may be put immediately into operation as a going concern.

In the interest of all holders of all classes of the Debtor's securities, the Debtor therefore respectfully submits that the application to intervene or to revive the appeal should be denied.

Respectfully submitted,

JONES, DAY, COCKLEY AND REAVIS,

Attorneys for the Debtor.

BRADLEY AND MURPHY EXHIBIT 6.**Memorandum in Support of Application of Young for Leave to Intervene and to be Heard (March 10, 1942).**

(Case No. 9148, U. S. C. C. A. 6—caption omitted.)

Applicant is a holder of 138 shares of the First Preferred Stock of The Higbee Company, a corporation being reorganized under Section 77B of The Bankruptcy Act and Acts Amendatory thereof, the reorganization proceedings pending in the United States District Court for the Northern District of Ohio, Eastern Division from whose order this appeal is taken.

Appellants Potts and Boag are also holders of Preferred Stock who objected to the Plan of Reorganization of Higbee upon three grounds: First, that a large unsecured indebtedness of Higbee represented by subordinated notes in the principal amounts of \$1,292,534.74 and \$258,506.94 was in truth and in fact a contribution to the capital of that corporation at the time the advances were made to Higbee by The Cleveland Terminals Building Company, the then owner of all of Higbee's outstanding common stock. Second, in the alternative that the claims on the notes should not be allowed for more than \$100,000 that being the amount paid for said notes by one Midamerica Corporation at the famous Morgan auction sale in 1935. (This Court has heretofore had occasion to scrutinize said auction and has found that certain securities there purchased were held in trust for debtor corporations, *In re The Van Sweringen Co. etc.*, 119 F. (2) 231.) Third, that in no event should the claims be allowed for more than \$600,000 that being the amount which one Charles L. Bradley and one John P. Murphy agreed to pay for them at a time when said Bradley was a director of Higbee.

The Plan of Reorganization provides for a substantially larger participation and distribution to be made in respect of the notes than would be made were any of the objections of Potts and Boag sustained.

Applicant is informed that the said Bradley and Murphy have concluded an arrangement with Messrs. Potts and Boag individually whereby they will pay to Potts and Boag a substantial sum of money (reported to be \$150,000), if the said Potts and Boag will withdraw their appeal from

the order of the District Court approving the Higbee Plan. Thus, the many other Preferred Stockholders of Higbee will be deprived of the right to have this Court review and pass upon the validity of the objections which have heretofore been made. The very fact that a deal has been made at the reported figure of \$150,000 indicates the gravity and apparent validity of the objections, and demonstrates more clearly than any argument on our part that the questions heretofore presented by Messrs. Potts and Boag should receive this Court's full attention.

It is interesting also to note that The Higbee Company, debtor, recently filed a motion to dismiss the appeal on certain technical grounds. On that occasion the motion was vigorously opposed by Potts and Boag resulting in its denial. Now, a few short weeks later, Potts and Boag are consenting to the dismissal. We urge upon the Court that these facts incite scrutiny.

Potts and Boag have been appealing upon the ground that the treatment of Preferred Stock provided by the Higbee Plan is unfair to all Preferred Stockholders similarly situated, of which this Applicant is one. The situation is analogous to a class action or stockholders' suit. In this type of action the wrongful practice has unfortunately developed whereby defendant directors purchase the dismissal of the suit of a single stockholder by making him a substantial payment in which other stockholders do not participate, and thus avoid litigation of the rights of all stockholders. This evil has long been recognized as such by the courts, and where detected has always been disapproved. Rule 23(c) of the Rules of Civil Procedure for the District Courts requires that the dismissal or compromise of any such class action shall only be with the approval of the Court. Obviously, this rule contemplates the fair and equitable treatment of all stockholders as a prerequisite to any such dismissal.

In the prosecution of their objections Messrs. Potts and Boag have clearly been acting in a representative capacity. Thus in their reply brief on this matter when the same was pending in the United States District Court during the summer of 1941 they state:

"SECOND, it has been stated that objectors own and therefore represent only 260 shares of Higbee First

Preferred. While we believe that the owner of a single share has as much right to be heard as the owner of many shares, we wish to point out to the court that objectors were originally members of the New Preferred Stockholders' Committee; that objectors resigned from said committee in protest over the unauthorized action of its counsel in approving this Plan. The representation which said New Preferred Stockholders' Committee now claims was acquired mainly through the presence on such Committee of Messrs. Potts and Boag, the present objectors, and it is now a fact that a very large proportion of the stockholders which the New Preferred Stockholders' Committee claims to represent actually look to these objectors for the protection of their interest. The two remaining members of that committee are the owners of 10 shares of Preferred Stock each."

Clearly, at the time the foregoing brief was submitted, Messrs. Potts and Boag considered themselves as acting in a representative capacity and so stated to the Court.

Since this Court on January 13, 1942 overruled the motion of the debtor to dismiss the appeal of Messrs. Potts and Boag and since it is apparent that that appeal was not personal to them but for the benefit of all Preferred Stockholders, this Court should now refuse to permit the Preferred Stockholders to be left without the opportunity of having the Higbee Reorganization Plan reviewed as would be the case if the request for dismissal by Messrs. Potts and Boag is sustained and no other intervenor is supplanted in their place.

In the instant case the only shareholders who are to benefit are Messrs. Potts and Boag whose dismissal of this appeal is being purchased by persons interested in having the Plan approved according to its present terms. If it is worth \$150,000 to cause this appeal to be terminated, then that sum should go to the benefit of all Preferred Stockholders and not just the two whose names appear in this matter as appellants.

Applicant as a Preferred Stockholder has not entered this proceeding prior to this time as Potts and Boag were presenting the objections, and duplication of appeals would have been unnecessary and would have unduly imposed upon the time of the Court.

Applicant stands ready at his own expense to continue this appeal in the interest of all Preferred Stockholders to the end that there may be an adjudication of the fairness of the Plan that is now sponsored by the debtor. This Applicant therefore respectfully requests that he be permitted to intervene and prosecute this appeal, or that he be substituted for appellants herein, and that he be granted an oral hearing in order that he may demonstrate to the Court the justice and fairness of his position and the evil which will result from a denial of the application and the attendant dismissal of the present appeal.

Respectfully submitted,

PAUL KUNKEL, (s)

ROBERT J. BULKLEY, (s)

JAMES A. BUTLER, (s)

*Attorneys for Applicant,
Robert R. Young.*

March 10th, 1942.

Copies of the foregoing brief served by mail this 10th day of March, 1942 upon the following:

JONES, DAY, COCKLEY & REAVIS,

Union Commerce Building,
Cleveland, Ohio,

Attorneys for Debtor.

J. F. POTTS, Esq.,

Auditorium Building,
Cleveland, Ohio,

*Attorney for J. F. Potts and
W. W. Boag.*

McKEEHAN, MERRICK, ARTER & STEWART,
Terminal Tower,
Cleveland, Ohio,

Attorneys for Bradley and Murphy.

KUNKEL & KUNKEL,

Attorneys for Applicant.

BRADLEY AND MURPHY EXHIBIT 7.**Application of Robert R. Young for Leave to Intervene (March 10, 1942).**

(Case No. 9148, U. S. C. C. A. 6—caption omitted.)

Now comes Robert R. Young and respectfully moves this Court for leave to intervene in this appeal and represents to the Court as follows:

1. That he is the owner of 138 shares of the First Preferred Stock of The Higbee Company, debtor herein.

2. That Messrs. J. F. Potts and William W. Boag have been prosecuting this appeal in a representative capacity on behalf of all Preferred Stockholders including your Applicant.

3. That said Potts and Boag have asked leave to withdraw their appeal prior to an adjudication thereof.

4. That said request for dismissal by Potts and Boag is made without the consent of this Applicant and without notice to any other Preferred Stockholders.

5. That the request by Potts and Boag for leave to dismiss their appeal is brought about by the conclusion of an arrangement between and among said Potts and Boag and one Charles L. Bradley, President and Director and The Higbee Company, and one John P. Murphy, a Director of The Higbee Company, whereby the said Potts and Boag receive certain substantial cash considerations which do not accrue in favor of any other holder of Preferred Stock.

6. Your Applicant and the other holders of Preferred Stock of The Higbee Company, debtor, will suffer irreparable injury unless this Application for leave to intervene and prosecute the aforesaid appeal is granted.

WHEREFORE Applicant respectfully prays that an order be entered permitting Applicant to intervene in this appeal and prosecute the same on his own behalf and on behalf of all other Preferred Stockholders of The Higbee Company, debtor.

PAUL KUNKEL, (s)

ROBERT J. BULKLEY, (s)

JAMES A. BUTLER, (s)

*Attorneys for Applicant,
Robert R. Young.*

Copies of the foregoing brief served by mail this 10th day of March, 1942 upon the following:

JONES, DAY, COCKLEY & REAVIS,
Union Commerce Building,
Cleveland, Ohio,
Attorneys for Debtor.

J. F. POTTS, Esq.,
Auditorium Building,
Cleveland, Ohio,
*Attorney for J. F. Potts and
W. W. Boag.*

McKEEHAN, MERRICK, ARTER & STEWART,
Terminal Tower,
Cleveland, Ohio,
Attorneys for Bradley and Murphy.

.....
Attorney for Applicant.

BRADLEY AND MURPHY EXHIBIT 8.

**Journal Entry, March 11, 1942, United States
Circuit Court of Appeals.**

(Case No. 9148—caption omitted.)

Before: SIMONS, ALLEN AND MARTIN, JJ.

Pursuant to stipulation of counsel it is now ordered that the appeal herein be and the same is dismissed.

Approved for entry:

CHARLES C. SIMONS,
Circuit Judge.

A true copy: *z*

Attest: J. W. MENZIES,

*Clerk, U. S. Circuit Court of Appeals,
Sixth Circuit.*

(Seal)

BRADLEY AND MURPHY EXHIBIT 9.
Journal Entry, March 11, 1942, United States
Circuit Court of Appeals.

(Case No. 9148—caption omitted.)

Before: SIMONS, ALLEN AND MARTIN, *JJ.*

The application of Robert R. Young for leave to intervene having been considered by the court;

It is now ordered that said application be and the same is denied.

Approved for entry:

CHARLES C. SIMONS,
Circuit Judge.

A true copy:

Attest: J. W. MENZIES,

Clerk, U. S. Circuit Court of Appeals,
Sixth Circuit.

(Seal)

BRADLEY AND MURPHY EXHIBIT 10-A, B, C.

Notice Published in Cleveland Plain Dealer
and Newspaper Items.

Exhibit 10-A.

CLAIM OF ALLEGHANY REASSERTED ON CLEVELAND
HIGBEE CO. STORE.

Special to the Herald Tribune.

CLEVELAND, March 7.—The process of reshuffling assets of the former Van Sweringen railroad and real estate holdings as a result of settlement of suits against George A. Ball, of Muncie, Ind., took a new turn today when Robert R. Young, chairman, and Allan P. Kirby, president of Alleghany Corp., asserted their position regarding control of the Higbee Co. department store here.

Terminal & Shaker Heights Realty Co., a Young and Kirby company, has advertised for sale March 13 certain Higbee securities, formerly held by Mr. Ball as collateral for a note given by Charles L. Bradley and John P. Murphy for purchase of the store. Terminal & Shaker Heights Realty today declared that it will make no warranties with respect to title to the securities to be sold because of pending litigation.

At the same time, Mr. Young and Mr. Kirby explained that when they and associates bought control of Alleghany from Mr. Ball in 1937 there was included a second mortgage on the Higbee Building for \$1,200,000. They say that at that time Messrs. Bradley and Murphy were employed by them but that they purchased from Mr. Ball control of the department-store business, giving the securities now offered for sale as security for the purchase price.

As a result Messrs. Bradley and Murphy became financially interested in a store occupying, under a disputed lease, a property in which Young and Kirby were interested, the latter claim.

Messrs. Bradley and Murphy are being sued in Federal Court here in connection with the transaction and the Alleghany officials today asserted that any one aiding them to continue their hold at the present juncture will be held accountable.

Exhibit 10-B.

Cleveland Plain Dealer, Thursday, March 5, 1942:

ADVERTISE BLOCK OF HIGBEE STOCK.

YOUNG AND KIRBY INDICATE CONTROL OF STORE.

George A. Ball, wealthy Muncie (Ind.) manufacturer of glass jars, has turned over controlling securities in the Higbee Co., Cleveland department store, to Robert R. Young and Allan P. Kirby in partial settlement of the New York financiers' \$8,000,000 suit against Ball, it was indicated yesterday.

The Terminal & Shaker Heights Realty Co.—owned by Young, Kirby, Mrs. Young and the Seaboard Co., Ltd.—is advertising a public sale of Higbee securities for March 13. Ball has held them as collateral for a note made in 1937 by John P. Murphy, a director, and Charles L. Bradley, president, the Higbee Co.

It was indicated that unless Murphy and Bradley paid more than \$550,000 principal and interest due by March 13, Young and associates intended to "buy in" control of the store. Young is chairman and Kirby is president of Alleghany Corp., top holding company of the Chesapeake & Ohio Railway System.

The advertised list of securities follows:

\$1,292,534.74—6 per cent. subordinated note of the Higbee Co., due March 1, 1934;

\$69,673.71—Participation in \$523,-
nated note of the Higbee Co. due March 1, 1934;

\$258,506.94—6 per cent subordinated note of the Higbee Co. due March 1, 1934;

100,000 shares, no par value, of Higbee Co. common stock.

Two court cases are pending, however, concerning title or worth of the securities. One, filed last May 28 by Young and Kirby, charged Ball sold the Clevelanders the store for \$600,000—described as "far less" than value—because they allegedly conspired with Ball to block the New Yorkers from controlling the C. & O. Lines. The other, by a preferred stockholder, declares the securities should be held to have little or no value in reorganization of the Higbee Co.

The suits against Ball were dismissed at Indianapolis this week after a settlement. Terms were not announced. Young and Kirby alleged Ball illegally engaged in certain stock exchange transactions and thus misled the New Yorkers as to the value of certain securities they purchased from him in 1937.

Later, Young surrendered to Ball a key block of common in Alleghany Corp., which controls about 25 per cent. of the C. & O., and yesterday's disclosure led to speculation whether Ball also was returning the Alleghany stock to Young in the settlement.

When asked about the matter Murphy said, "I have no comment to make."

LEGAL NOTICES.

Notice of Public Sale.

Please take notice that The Terminal and Shaker Heights Realty Company, as holder of a certain promissory

note dated June 4, 1937, signed by C. L. Bradley and John P. Murphy in the original principal amount of \$540,000, will sell the following securities and obligations, consisting of the collateral for said note, at a public sale to be held on the front steps of the Cuyahoga County Court House at Ontario and Lakeside Avenues in the City of Cleveland, Ohio, on March 13, 1942, at 3:00 p. m. o'clock.

\$1,292,534.74—6% subordinated note of The Higbee Company due March 1, 1934;

\$69,673.71—participation in \$523,043.51 note of The Higbee Company due March 1, 1934. (Certain payments have been made in reduction of said participation so that the principal amount thereof is now \$9,419.36);

\$258,506.94—6% subordinated note of The Higbee Company due March 1, 1934;

100,000 shares, no par value, of the common stock of The Higbee Company.

The Terminal and Shaker Heights Realty Company reserves the right to bid for and purchase the aforesaid securities and obligations pursuant to the terms of the note.

mar 5-10

The Cleveland Press, Thursday, March 5, 1942:

ADVERTISE SALE OF HIGBEE CO. STOCK.

YOUNG AND KIRBY INTERESTS MAY OBTAIN CONTROL.

Control of Higbee Co. is involved in the sale of securities which George A. Ball, Muncie (Ind.) capitalist, has turned over to the Terminal & Shaker Heights Realty Co. in partial settlement of an \$8,000,000 suit brought in Indianapolis by Robert R. Young and Allan P. Kirby.

The Terminal & Shaker Heights Realty Co., owned by Messrs. Young and Kirby, Mrs. Young and the Seaboard Co. Ltd., has advertised the securities for sale in satisfaction of a note given to Mr. Ball in 1937 by John P. Murphy and Charles L. Bradley when the latter purchased control of the company.

The securities, held by Mr. Ball as collateral securing a note for \$540,000, include the following:

\$1,292,534—6 per cent subordinated note of the Higbee Co. due March 1, 1934.

\$69,673—participation in \$523,043 note of the Higbee Co. due March 1, 1934.

\$258,506—6 per cent subordinated note of the Higbee Co. due March 1, 1934.

100,000 shares, no par value, of Higbee Co. common stock.

Unless Messrs. Bradley and Murphy, president and a director of Higbee Co., respectively, pay the \$540,000 and accrued interest by March 13, the date of the sale, it was indicated that Mr. Young and his associates would buy in control of Higbee.

The \$8,000,000 suit brought by Young and Kirby was based upon their allegation that Mr. Ball had engaged in the manipulation of the market for securities purchased by them in 1937 when they obtained control of Alleghany Corp., top holding company in the Van Sweringen real estate and railroad setup. The suit was settled by compromise last month.

Exhibit 10-C.

Cleveland Plain Dealer, March 10, '42:

WARNS OF AIDING IN HIGBEE BATTLE

Robert R. Young and Allan P. Kirby, New York financiers, yesterday warned that "anyone joining with or assisting" efforts of Charles L. Bradley and John P. Murphy of Cleveland to retain control of the Higbee Co. department store here would be held "strictly accountable."

The Terminal & Shaker Heights Realty Co.—controlled by Young and Kirby—has advertised for public sale collateral which nominally controls the store. Financial circles heard that under a note made by Bradley and Murphy to George A. Ball of Muncie, Ind., who previously held the collateral, the Clevelanders must pay more than \$550,000 by Friday or see the securities "bid in" by Young and Kirby.

In a statement prompted by "publicity attendant upon the notice of sale," Young and Kirby pointed out they have a Federal Court suit pending against Bradley and

Murphy, charging they, while being employed by the New Yorkers, arranged to buy the securities from Ball and thus committed what the statement termed "a gross breach of fiduciary duty." The statement continued:

"Anyone joining with or assisting Bradley and Murphy in the perpetration or continuation of this wrong is equally liable to us. We shall hold anyone so doing strictly accountable. We demand as part of the relief prayed in the suit that these same Higbee securities be turned over to us. The suit has not yet been reached for trial, but it is pending in Cleveland."

Cleveland News, March 9, 1942:

CHARGE BREACH OF FIDUCIARY DUTY

Following publication of notice of sale of certain securities and obligations of The Higbee Co. by Terminal & Shaker Heights Realty Co., the following statement was issued today by Robert R. Young and Allan P. Kirby, owners of the realty company:

"On May 28, 1941, we instituted an action in Federal Court in Cleveland against Charles L. Bradley, John P. Murphy and others and in that suit we alleged in substance, among other things, the following:

"On April 24, 1937, we purchased from George & Frances Ball Foundation what was represented to us to be a controlling interest in the Van Sweringen real estate holdings including the building occupied by The Higbee Co. as tenant. Among the securities which we purchased from Ball Foundation was a second mortgage on the Higbee building in the amount of \$1,200,000. These assets were placed by us under the care and supervision of Bradley and Murphy who were at that time our representatives and employees. Yet despite the trust and confidence thus placed in them they, on June 4, 1937, purchased the securities and obligations of The Higbee Co. which are now offered for sale and thereby placed themselves in a position wholly inconsistent with our rights. They thereafter asserted their strongest efforts to reduce the amount of rent payable by Higbee and to squeeze out our second mortgage by urging foreclosure of the first mortgage.

"It was and is the theory of our suit that the conduct of Bradley and Murphy constitutes a gross breach of fiduciary duty, and that any one joining with or assisting Bradley and Murphy in the perpetration or continuation of this wrong is equally liable to us. We shall hold any one so doing strictly accountable. We demand as part of the relief prayed in the suit that these same Higbee securities be turned over to us. The suit has not yet been reached for trial but it is presently pending in Cleveland."

BRADLEY AND MURPHY EXHIBIT 11.

**Telegram, March 9, 1942, Securities and Exchange
Commission to J. W. Menzies, Clerk.**

TELEGRAM

**OFFICE BUSINESS—GOVERNMENT RATES
WESTERN UNION**

**From Securities & Exchange Commission
Bureau Cleveland Regional Office
Chg. Appropriation Sec. & Exch. Commis-
sion 1942**

**March 9, 1942
216-107**

**A. W. Menzies, Clerk
United States Circuit Court of Appeals
Federal Building
Cincinnati, Ohio**

Re: The Higbee Company

Securities and Exchange Commission not notified until today of Motion to Dismiss Appeal from order confirming reorganization plan although Commission is a party to the proceeding. No objection to dismissal of appeal, however, since we consider plan fair and feasible for reasons outlined in our advisory report which is included in record for

preliminary hearing on debtor's earlier motion to dismiss filed December 23, 1941.

SECURITIES AND EXCHANGE COMMISSION,
RICHARD B. AINSWORTH, *Attorney*,
Cleveland Regional Office.

BRADLEY AND MURPHY EXHIBIT 12.

**First Preferred Stock of The Higbee Co.
Purchased by Robert R. Young.**

HIGBEE COMPANY FIRST PREFERRED STOCK.

Account: Mr. Robert R. Young.

<i>Date</i>	<i>Amount</i>	<i>Price</i>	<i>Total</i>
3 21 40	16 shares	\$25.00	\$400.00
3 25 40	20 shares	\$26.00	520.00
4 2 40	8 shares	\$24.25	194.00
4 11 40	7 shares	\$26.50	185.50
5 16 40	25 shares	\$26.50	662.50
5 21 40	5 shares	\$26.50	132.50
9 24 40	7 shares	\$32.50	227.50
10 17 40	25 shares	\$37.25	931.25
10 21 40	5 shares	\$36.50	182.50
2 13 41	20 shares	\$38.50	770.00
	138 shares		\$4,205.75

YOUNG EXHIBIT 1.

Objections to Claims Filed by New Committee of Preferred Stockholders, verified by Potts (August 8, 1938).

IN THE DISTRICT COURT OF THE UNITED STATES

**FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION.**

**IN PROCEEDINGS FOR THE
REORGANIZATION OF A CORPORATION.**

No. 36,119.

**In the Matter of
THE HIGBEE COMPANY,
*Debtor.***

OBJECTIONS TO CLAIMS.

Now come Rufus K. Brown, Jr., Charles A. Heil, William W. Boag, and J. Fred Potts, preferred stockholders of the debtor corporation and as such constituting the new committee for preferred stockholders, and pursuant to the order of the Special Master permitting them to intervene in these proceedings upon the matters herein set forth, respectfully say:

1. Charles L. Bradley and John P. Murphy have filed no proof of claim against the debtor corporation but they have asserted against said corporation and said corporation has listed in its schedule of debts filed in these proceedings, a claim evidenced by promissory notes originally payable to The Cleveland Terminals Building Company, in the principal sum of \$1,551,041.00 together with interest thereon. Said claim is invalid for the reason that at the time said notes were executed by The Higbee Company to The Cleveland Terminals Building Company, the Directors of The Higbee Company and The Higbee Company had no authority or capacity under the charter and by-laws of the Company to incur such indebtedness, and The Cleveland Terminals Building Company, as owner of all of the common stock of The Higbee Company, had

knowledge of such lack of authority or capacity on the part of the Directors of The Higbee Company and The Higbee Company.

2. If said claim was valid in its inception it is, nevertheless, unenforceable against The Higbee Company because it was purchased for a greatly reduced sum by the said Charles L. Bradley and John P. Murphy, after The Higbee Company had filed its petition for reorganization under Section 77B of the United States Bankruptcy Act, and while said proceedings were pending, and because the said Charles L. Bradley and John P. Murphy occupied a position with respect to The Higbee Company and its preferred stockholders which prohibited the said Charles L. Bradley and John P. Murphy from profiting in the purchase of claims against the Company. Because of the foregoing facts, such claim, if valid, may be asserted against The Higbee Company in only the amount actually paid therefor by the said Charles L. Bradley and John P. Murphy.

3. At the time of the purchase of said claim and without the payment of any further consideration, the said Charles L. Bradley and John P. Murphy also acquired the total outstanding common stock of the Higbee Company and a participation of approximately \$70,000.00 in the so-called Senior Bank Indebtedness of The Higbee Company, which for the same reasons as set forth in the next preceding paragraph, the said Charles L. Bradley and John P. Murphy hold for the benefit of The Higbee Company, subject only to reimbursement for the amount they actually paid therefor.

4. The Cleveland Terminals Building Company and its assignees, The Metropolitan Life Insurance Company and The Cleveland Trust Company, as Trustee for The Metropolitan Life Insurance Company, have asserted that they are creditors of The Higbee Company by virtue of certain leases executed by The Cleveland Terminals Building Company as lessor and The Higbee Company as lessee. Said claims are invalid for the reason that the said leases are void because of the following facts:

In 1929, in spite of the fact that all of the owners of various department stores, including The Higbee Company, which had been solicited by The Cleveland Terminals

Building Company to occupy its proposed building on the Public Square, had refused to become tenants of such proposed buildings, The Cleveland Terminals Building Company, solely to enhance the value of its own real estate development at the Public Square, and the property belonging to its affiliated corporations, purchased all of the outstanding stock of The Higbee Company, constructed the building which had been rejected by the other department store owners, abandoned its existing site and arbitrarily removed The Higbee Company to such building from the location where it had enjoyed a long period of continued success. The time of such removal was only eight (8) years after the first preferred stockholders had purchased their stock upon the written representation of The Higbee Company that it had a long term lease upon the location where for a considerable period it has been preeminently successful. Such removal not only involved the change from a location already proven to be excellent by experience to one that no other department store concern would hazard, but further involved the imposition upon The Higbee Company of a tremendous financial burden which transformed the Company from a sound, abundantly solvent institution to one in precarious financial condition. The leases upon the new quarters thus imposed upon The Higbee Company by The Cleveland Terminals Building Company for the sole benefit of The Cleveland Terminals Building Company and its affiliated companies were unconscionable and unfair, violated the charter rights of the preferred stockholders, were not within the authority of the Directors of The Higbee Company and placed The Cleveland Terminals Building Company, as owner of the common stock of The Higbee Company, in a position of preference to the preferred stockholders in obtaining future earnings of the Company, contrary to both the spirit and letter of the agreements between The Higbee Company and the preferred stockholders. By virtue of the foregoing facts such leases should be declared null and void and set aside together with all rental claims of The Cleveland Terminals Building Company and its assignees based upon such leases.

5. As a result of such unconscionable and unlawful removal from its successful location to The Cleveland Ter-

minimal Building Company property, The Higbee Company suffered a great loss in an amount not less than \$5,000,000.00, for which amount The Higbee Company has a claim against The Cleveland Terminals Building Company, which claim may be off-set or asserted as a counter-claim against any claim for rent, or for use and occupation or any other claim which may be established by The Cleveland Terminals Building Company or its assignees, The Metropolitan Life Insurance Company or The Cleveland Trust Company as Trustee of The Metropolitan Life Insurance Company, against the Higbee Company. Said claim of \$5,000,000.00 may also be used as a set-off against said claim of \$1,551,041.00 originally belonging to The Cleveland Terminals Building Company and now owned by Charles L. Bradley and John P. Murphy, if said claim be valid in its inception.

6. At the time that The Cleveland Terminals Building Company acquired the total outstanding common stock of The Higbee Company for the purpose of removing The Higbee Company to the building of The Cleveland Terminals Building Company, The Higbee Company had a surplus of approximately \$2,045,000.00. At said time The Cleveland Terminals Building Company knew that in order to move the department store, The Higbee Company would be subjected to great financial expenditures in excess of its available surplus, and The Cleveland Terminals Building Company agreed to procure the financing necessary to effect the removal. In spite of such knowledge and such agreement, The Cleveland Terminals Building Company unlawfully and fraudulently, through its control of The Higbee Company, caused The Higbee Company to declare and pay to it out of said surplus a stock dividend consisting of 50,000 shares of common stock of The Higbee Company of a total value of \$1,000,000.00 and cash dividends aggregating \$675,000.00.

During the period that The Cleveland Terminals Building Company was unlawfully appropriating said surplus as dividends it loaned to The Higbee Company the sum of \$1,551,041.00, thereby converting said amount of the surplus available first for dividends to preferred stockholders into an obligation of The Higbee Company, by which The

Cleveland Terminals Building Company secured an unlawful priority over the preferred stockholders.

The said claim against The Higbee Company in the sum of \$1,551,041.00 should therefore be cancelled and surrendered and restored to the surplus of The Higbee Company together with the sum of \$123,959.00 being the amount in excess of \$1,551,041.00 taken by The Cleveland Terminals Building Company as unlawful dividends.

In the event that it is determined that said claim of \$1,551,041.00 is invalid for the reason set forth in paragraph 1 hereof, or for some other reason, and that it should not be restored to the surplus of The Higbee Company, then The Higbee Company has a claim against The Cleveland Terminals Building Company for the sum of \$675,000.00 of cash dividends wrongfully taken by The Cleveland Terminals Building Company, and has a claim for the sum of \$1,000,000.00, the value of said stock when issued to The Cleveland Terminals Building Company.

The aforesaid claims of \$1,675,000.00 of The Higbee Company against The Cleveland Terminals Building Company may be offset or enforced as counter-claim against any claims asserted by The Cleveland Terminals Building Company or its assigns against The Higbee Company.

WHEREFORE, the said Rufus K. Brown, Jr., Charles A. Heil, William W. Boag and J. Fred Potts for themselves, and for all of the first and second preferred stockholders of The Higbee Company pray:

1. That the said Charles L. Bradley and John P. Murphy be required to file in these proceedings proof of any claim asserted by them against The Higbee Company.

2. That the claim of said Charles L. Bradley and John P. Murphy in the sum of \$1,551,041.00 together with interest thereon be entirely disallowed, for the reason that the Directors of The Higbee Company and The Higbee Company had neither the authority nor the capacity to incur each indebtedness.

3. That if it be determined that the Directors of The Higbee Company and The Higbee Company had the authority and capacity to incur such indebtedness said claim together with the sum of \$123,959.00 be surrendered and restored to the surplus of The Higbee Company.

4. That if it be determined that said claim is valid and should not be restored to the surplus of The Higbee Company, the said claim be allowed only in the amount that the said Charles L. Bradley and John P. Murphy actually paid therefor, and that the said Charles L. Bradley and John P. Murphy be declared to hold said claim together with all of the common stock of The Higbee Company and their participation in the Senior Bank Indebtedness solely for the benefit of The Higbee Company, subject only to the amount actually paid therefor by the said Charles L. Bradley and John P. Murphy.

5. That the claims of The Cleveland Terminals Building Company or its assignees, The Metropolitan Life Insurance Company, and The Cleveland Trust Company, trustee for The Metropolitan Life Insurance Company for rental under the leases between The Cleveland Terminals Building Company and The Higbee Company and the agreements based upon such leases be disallowed, and such leases and agreements be set aside and declared null and void.

6. That if it be determined that The Higbee Company is indebted to The Cleveland Terminals Building Company, or any of its assignees for rent or use and occupation of property owned by The Cleveland Terminals Building Company or for any other claim of said company against The Higbee Company, or if it be determined that The Higbee Company be indebted to any extent upon said claim of \$1,551,041.00 there be off-set against such indebtedness the sum of \$5,000,000.00 owed by The Cleveland Terminals Building Company to The Higbee Company as damages for the losses to The Higbee Company occasioned by the arbitrary removal of its business to the building of The Cleveland Terminals Building Company.

7. That if it be determined that said claim of \$1,551,041.00 is valid and that it should not be restored to the surplus of The Higbee Company, there be off-set against the said claim of \$1,551,041.00 the sum of \$1,675,000.00 owed by The Cleveland Terminals Building Company to The Higbee Company as a result of the unlawful distribution of 50,000 shares of common stock and \$675,000.00 in cash as dividends by The Higbee Company to The Cleveland Terminals Building Company.

That the balance of said \$1,675,000.00 after the allowance of such off-set of \$1,551,041.00, to-wit: the sum of \$123,959.00, be off-set against such claims for rental or use and occupation as may be determined to be held by The Cleveland Terminals Building Company or its assignees.

8. That if it be determined that said claim of \$1,551,041.00 is invalid and should not be restored to surplus, the sum of \$1,675,000.00 be off-set against any claims which have been or may be enforced by The Cleveland Terminals Building Company or its assignees ~~against The Higbee Company.~~

(signed) BLOOMFIELD AND ORR,

Attorneys for New Committee of Preferred Stockholders.

Bloomfield and Orr,
818 Guardian Bldg.

STATE OF OHIO,
CUYAHOGA COUNTY, SS.

J. FRED POTTS, being first duly sworn, says that he is a Preferred Stockholder and a member of the New Preferred Stockholders Committee of the Debtor Corporation; that he has read the foregoing Objections to Claims, and the facts and allegations contained therein are true as he verily believes.

(signed) J. FRED POTTS.

Sworn to before me and subscribed in my presence this 8th day of August, 1938.

(signed) ERLING C. THELLER,
Notary Public.

YOUNG EXHIBIT 2.**Answer Brief of New Preferred Stockholders Committee to Brief of Bradley and Murphy on Motions (December 15, 1938).**

(Case No. 36,119, U. S. D. C., N. D. O.—caption omitted.*)

Counsel for Charles L. Bradley and John P. Murphy have filed a nineteen page Brief, directed largely to an attack upon the Intervention Order of the Master, of July 13th, 1938, and an attack upon the Committee itself.

From the time Mr. Fackler appeared in these proceedings, representing the claimants, Charles L. Bradley and John P. Murphy, it required no great amount of perspicacity to see that he was reversing the procedure and had adopted the theory that "the best defense is an offense." From that time on, the Committee and its counsel have been deluged with motions, briefs and attacks upon the personnel of the Committee itself, none of which attempt to reach the real merit of the controversy.

On May 28th, 1938, we filed, on behalf of individual stockholders whom we represented, and before the existence of this Committee, Objections to the Plan of Reorganization. These objections were four in number and specifically set forth in the pleading filed. Thereafter, other stockholders, seeking to protect their interests and to prevent the further trampling upon their rights, organized a committee to act for themselves and for those who desired to join with them, and, upon application, an order was made by the Special Master on July 13th, 1938, granting the New Preferred Stockholders Committee the right to intervene in these proceedings.

*** PRINTER'S NOTE:**

The captions appearing in the original Young Exhibits 2-13, 15-17 and 21-25, incl., being substantially the same as that on Young Exhibit 1, *supra*, have been omitted to avoid duplication.

WHAT HAS OCCURRED SINCE GRANTING OF ORDER OF INTERVENTION TO CAUSE THE MASTER TO REVOKE SUCH ORDER?

This question is a pertinent one, as anyone who has followed these proceedings cannot possibly escape the conclusion that, if the Master had appropriate reason for granting the intervention order on July 13th, 1938, that developments since that time provide, if anything, a much stronger reason for the existence of a Preferred Stockholders Committee that is vigilant of the rights of these security holders and is under no influence from any other interests, whether they be debtor, claimant or creditor of the company. The committee's course, since the intervention order, has been to have an examination of the debtor's books made by independent auditors. This work was done after application to the Master and under an order signed by him. Thereafter, on August 8th, 1938, the Committee filed its Objections to Claims. These objections were directed in the main to two propositions, First, an objection to the claim, set up on the books of the company, in the sum of \$1,551,041, with accrued interest, asserted against the company by Charles L. Bradley and John P. Murphy, which claim we contend they purchased for about thirty cents on the dollar at a time when the debtor company was in reorganization under the provisions of 77B of the Bankruptcy Act, and while they owed a fiduciary duty to the Preferred Stockholders and the Company; and Second, an objection to the claim of The Cleveland Terminals Building Company for a large sum claimed as back rent, for the reason that, we contend, a fraud was perpetrated upon the Preferred Stockholders and the debtor company by the Cleveland Terminals Building Company at the time the original lease was entered into. Nothing has occurred since the filing of these Objections on August 8th, except attendance by the Committee's counsel at hearings, from time to time, ready to present its evidence in support of these objections.

The Master will recall that, at one of the hearings in August, we made the statement in open Court that we had telephoned one of the members of the firm of Tolles, Hogsett and Ginn for the purpose of informing him that we would proceed with the taking of testimony at the next

hearing, and were told that this could not be done, as Mr. Abbott was out of the city, and *they did not know whether they would represent Mr. Bradley and Mr. Murphy in this matter.* We shall refer to this matter later in our brief. These facts are recited in support of our contention that, since the intervention order of July 13th, 1938, the Committee has done only those things which a vigilant group would do to obtain the facts from the records of the company and seek to protect the preferred stockholders by filing objections to claims against the company about which there is serious question.

ATTACK UPON COMMITTEE FOR THE PURPOSE OF HARASSMENT.

A frequently employed legal stratagem is to attack a group of individuals for the purpose of harassing them and discouraging their continued service on a stockholders committee. We have already shown the Master, by testimony at the last hearing, how this method of procedure operates, and the fact that it resulted in the cancellation of a Power of Attorney of one of the Preferred Stockholders represented by this Committee, who owns 254 shares of First Preferred Stock. No stockholder or member of a committee looks forward with great relish to being subpoenaed into Court and subjected to cross examination when he knows that he paid for his stock, is acting in good faith in trying to protect himself and the group he represents, and has done nothing except that for which he should be commended. We have a good example of this situation in Mr. Fackler's attack upon Fred Potts. The facts were made perfectly clear in his testimony: Mr. Potts owns 250 shares of First Preferred Stock, which were transferred to him by his wife and, at the time of transfer, Mr. Potts charged himself with \$100.00 a share, which is the price of the stock originally paid for it by the mother of Mrs. Potts, from whom the stock was inherited, and which represented an investment of \$25,000. Certainly Mr. Potts had a right to become a member of a protective committee and, being a lawyer himself, he would naturally prefer to subject himself to this sort of harassment rather than have Mrs. Potts drawn into it.

Mr. Fackler states that there is no proof before the Court that any stockholder has appointed said Committee to represent such stockholders. That is answered by the Committee's sworn statement filed under the provisions of the Chandler Act, setting forth in the required detail the stockholders represented by the Committee, and no further proof of this fact is required by the Act. The testimony shows that we offered to hand the Powers of Attorney to the Master for inspection in open Court, but that we refused to show them to Mr. Fackler on the ground of privilege, and for other reasons which appear in the record.

Mr. Fackler says that there is no New Preferred Stockholders Committee, for the reason that they only held one meeting, and for the further reason that the Committee had no Chairman or Secretary, and that no written minutes were ever kept. We do not understand that any such requirements are necessary. Groups of stockholders may organize among themselves in numbers of two or more for the protection of their investment and for the protection of the rights of other stockholders who desire to join with them in order to prevent the perpetration of a fraud upon their rights. Such committees may operate effectively by individual members meeting with its counsel, from time to time, supplying information for investigation and aid in the work of the committee by individual effort. Frequently, National and State committees function, and do so very effectively, by rarely getting their entire group together at one time, but coordinate the work of the individual members by each member maintaining contact with the committee's counsel. Perhaps the best answer to the effectiveness with which this plan has operated in connection with the work of this Committee is the vigor and intensity of Mr. Fackler's attacks upon it for the purpose of destroying its work.

The most natural procedure for these stockholders to follow, having learned that Mr. Rufus K. Brown, Jr., on behalf of himself and his family, had filed objections to the Plan of Reorganization, was to band themselves together for the protection of their interests and to form a committee which would bona fide represent not only their own interests, but those of other Preferred Stockholders who would indicate their willingness to join with them. That

is precisely the course they took, and the testimony bears this out.

WHY DOES MR. FACKLER STATE THAT THE PREFERRED STOCKHOLDERS ARE ALREADY ADEQUATELY REPRESENTED BY THE MIERKE COMMITTEE, AND WHY DOES HE PREFER TO DEAL WITH THEM?

This becomes a very important question, in view of the fact that Mr. Fackler represents Charles L. Bradley and John P. Murphy who are asserting a claim against the debtor company for an amount, including interest, of about \$1,800,000. This committee contends and expects to prove that these gentlemen bought this claim for about thirty cents on the dollar during the reorganization proceedings and while in a fiduciary position towards the debtor and its Preferred Stockholders, thereby attempting to make a profit for themselves of \$1,200,000 on the transaction. This claim was set up for the full amount on the books of the company, that is, at one hundred cents on the dollar, and it so appears in the Plan of Reorganization and on financial statements filed with the District Court. The Mierke Committee has filed no objection to it. What Mr. Fackler wants is a "friendly committee," and indications of the cooperation between the Mierke Committee and Mr. Fackler have occurred during the course of these hearings, which the Master could not have failed to observe.

At the time this committee filed in open Court its sworn statement and the statement of its counsel, under the provisions of the Chandler Act, surely the Master did not fail to note the eagerness with which these statements were examined by counsel, and how Mr. Fackler called Mr. Mierke from the back part of the hearing room as they conferred together and the avidity with which they examined the information set forth in these statements. It must be remembered that this is the same Mr. Mierke who is Chairman of the other Preferred Stockholders Committee, and who would be expected to resist and oppose this claim asserted by Mr. Fackler for Charles L. Bradley and John P. Murphy, as, clearly, this claim is adverse to the interests of the Preferred Stockholders.

We attempted to show the Court that Mr. Mierke has acted as attorney for the debtor company in over 460 cases

in the Common Pleas Court of Cuyahoga County and the Municipal Court of Cleveland, for which he received compensation from the debtor company. One cannot serve two masters. Mr. Mierke can represent himself as a Preferred Stockholder and continue to accept fees for legal services from the debtor company, but he cannot represent the group of Preferred Stockholders and continue to accept such compensation for legal services, as such interests are clearly conflicting. Mr. Bradley is President of The Higbee Company, and it should take very little imagination to determine how long Mr. Mierke would continue to handle hundreds of cases for The Higbee Company if he dared to oppose Mr. Bradley's asserted claim against the Company or Mr. Bradley's proposed Plan of Reorganization. The facts speak for themselves, and much more forcefully than argument. Mr. Mierke was a member of the Board of Directors of The Higbee Company and did not dissent from the proposed Plan of Reorganization. Mr. Mierke's committee has not to this date filed an objection to the Charles L. Bradley and John P. Murphy claim, which seeks to make an unconscionable profit of \$1,200,000 on the claim they assert against the company. It may, therefore, be clearly seen why Mr. Fackler alleges in his brief that "the Preferred Stockholders are already adequately represented by the Mierke Committee." Mr. Fackler wants a "friendly" committee, a committee which he can handle, and a committee which will think not so much of protecting the rights of the Preferred Stockholders, but other interests as well. We do not represent any other interests and no individual member of our committee represents any other interests, and any such statement is false. No such testimony was submitted, and no such testimony could be submitted. If Mr. Fackler sees something yellow, it is due to his own jaundiced eye and not based upon any existing fact. Mr. Fackler makes the statement that our committee was organized for the purpose of "hindering and obstructing" the reorganization. Not a shred of proof is in the record to support any such malicious statement. If this committee has hindered and obstructed anything at all, it has hindered and obstructed a scheme on the part of Mr. Fackler's clients, Charles L. Bradley and John P. Murphy, to make a profit of \$1,200,000 on a transaction involving Mr. Brad-

ley's own company, while seeking reorganization under the provisions of 77B of the Bankruptcy Act, to which profit we contend they are not in equity and good conscience entitled.

STATUS OF ONE WHO PURCHASES CLAIMS AGAINST HIS OWN COMPANY DURING REORGANIZATION FOR LESS THAN FACE VALUE.

In Mr. Fackler's Brief directed to our Objections to Claims, he cites the case *In re McEwen Laundry, Inc.* decided June 4th, 1937, C. C. H. Bankruptcy, No. 4649, 90th Fed. 972. We have no way of knowing whether Mr. Fackler took this citation out of the Digest and then cited a part of the Syllabus in support of his contention, but we do know that, if he read the complete text of the case, he did not find it on Page 972. We at first thought that this page number was a typographical error, but when Mr. Fackler again cited this case in his Reply Brief, with the page number 972, it created some question in our minds as to whether Mr. Fackler has read the full text of this decision and, if so, why he has only cited a small part of the syllabus. The case appears on Page 872, 90 F. (2nd), and the complete text of the decision is of interest because of the striking similarity to some of the facts in the case before the Court. McEwen and an associate, who between them owned all of the Common Stock of a Company, purchased unsecured claims against their own company for fifteen cents on the dollar, while the company was in reorganization under 77B of the Bankruptcy Act. This was discovered by other creditors, who filed a petition asking the Court to determine what consideration was paid for these claims and to limit the exercise of any power in connection with the ownership of said claims to the actual consideration paid therefor. A motion was filed by McEwen and his associate to dismiss the petition insofar as it applied to claims held by them. The District Court denied this motion to dismiss and, in the same order denying the motion, gave the said McEwen and his associate certain time in which to file their answers. He did not, however, wait for the incoming answers, and ruled that in the matter of voting on a Plan of Reorganization of the corporation, purchasers and assignees of claims of creditors shall be allowed to vote only the amount paid by them for such claims.

The U. S. Circuit Court of Appeals held that this, in effect, was an adjudication of an important and material controversy between the petitioners and McEwen and his associate without an issue having been made of it. That part of the order was, therefore, set aside and remanded. The remainder of the Court's ruling on the motion was sustained. The Circuit Court in its opinion used this language: "We need not determine whether it had the power to entertain the petition under the 'scrutiny clause,' for the bankruptcy Court is a Court of equity and it undoubtedly had such power under the broad principles of equity jurisprudence." Moreover, the Court referred to Section 207, Title 11, of the Reorganization Act, sometimes called the "Scrutiny clause," citing this language: "*and may limit any claims filed by such committee, member, or agent, to the actual consideration paid therefor.*"

In the case before the Master, this committee contends and expects to prove that the actual consideration paid by Charles L. Bradley and John P. Murphy for the \$1,800,000 claim which they are asserting against the debtor company, was \$600,000, of which amount \$60,000 was cash, and the balance in the form of an unusual note, which contains a provision that no deficiency judgment can be taken thereon against the Obligors. Included with the purchase of this claim and without the payment of any other consideration, was all of the Common Stock, 100,000 shares of The Higbee Company, and a participation of about \$70,000 in the Senior indebtedness. The committee contends that, under the scrutiny clause of the Reorganization Act, and supported by other authorities, the very outside limit that should be allowed Bradley and Murphy on their claim is the consideration they actually paid for it. Moreover, the committee has made an investigation of the origin of this so-called Junior Indebtedness, and finds that most of it was siphoned out of the surplus of The Higbee Company by the Van Sweringen group, of which Charles L. Bradley and John P. Murphy were a part. After \$1,675,000 was thus taken out of the surplus of the debtor company, the Van Sweringen group, through The Cleveland Terminals Building Company, loaned this money back to The Higbee Company, so that the net effect of the entire financial manipulation was that The Higbee Company was being loaned \$1,551,000 of its own money. Therefore, it may well be that this claim,

being asserted by Mr. Fackler on behalf of his clients, is entirely invalid. In any event, it should be carefully examined by the Master, after submission of evidence, and an adjudication made.

WHAT IS MOTIVATING FORCE BEHIND THE ATTACK ON THIS COMMITTEE?

Many abuses found their way into the bankruptcy practice, so that it became necessary for District Courts in these proceedings to adopt a rule which required attorneys representing the bankrupt, the trustee and creditors to file affidavits with the Court to the effect that there was no collusion among them. These same practices, no less virulent in their effect, though in a different form, have also found their way into the practice under the Reorganization Act of 1934. The public mind was so shocked by the disclosures, investors complained to their representatives in Congress, and investigations were conducted by congressional committees, with the result that the Chandler Bill was passed to stop these abuses and to prevent collusion between groups of attorneys representing divergent interests.

Chairman Douglas, of the Securities and Exchange Commission, states the case in crystal clear language in an article prepared for the American Bar Association Journal, appearing in the November 1938 issue, page 879, first column:

"The Bar has had to bear the brunt of the criticisms, and at times, it must be admitted, the critics have been justified. For the quality of reorganization practices has in large measure been dependent upon the lawyer. His client,—whether the latter be trustee, receiver, debtor, underwriter, or protective committee—has required the lawyer to counsel him not only on what may lawfully be done but also on what may be wisely, properly and profitably done. The lawyer has done more than decide the forum for and method of reorganization. He has been in a position to determine the character and quality of administration of estates undergoing reorganization. He has been a focal point for the organization and activity of protective committees, and he has played an indispensable role in the

formulation of their policies. Upon him a large part has depended the honesty, efficiency and thoroughness of reorganization plans.

The lawyer is therefore, of necessity, a controlling and conditioning force in the entire reorganization system. The traditions of the profession make the lawyer peculiarly fitted for the exacting stewardship which reorganizations demand of the profession, and the Bar can be certain that there will be continued reliance upon it for such services. *However, to some lawyers essaying multiple roles in reorganizations, the sharp lines drawn by the professional canons of ethics have in the past been blurred and indistinct. Not infrequently, for example, they have represented conflicting interests and, against the spirit, if not the letter, of the canon, have contended in behalf of one client for that which duty to another client required them to oppose."*

Congressman Chandler, who introduced the bill in the House and whose name the Act bears, pointedly refers to these same abuses in an article, which also appears in the November 1938 issue of the American Bar Association Journal, page 883, which we quote:

"Several investigations were made by congressional committees and other agencies to determine the effect of the operation of Section 77B and to ascertain if abuses were prevalent. These investigations disclosed the following:

(1) Virtual control of reorganization proceedings by inside groups, resulting in the perpetuation of such control in the working out of reorganization plans and also in the corporation after reorganization;

(2) The failure of those in control to reveal and punish acts of corporate mismanagement or even more serious offenses."

What are the facts in this Higbee Company reorganization? The taking control of the Higbee store, its removal to the Public Square site, the siphoning out of \$1,675,000 of its earned surplus to other Van Sweringen enterprises, so that the \$2,000,000 earned surplus, which it had in 1929,

became a \$3,765,000 deficit by 1933, was entirely a Van Sweringen financial manipulation. During that period, the law firm of Tolles, Hogsett and Ginn were one of the groups of Van Sweringen attorneys. The firm of Tolles, Hogsett and Ginn represents the debtor company in this proceeding. This same firm were also attorneys for The Cleveland Terminals Building Company, Lessor of the debtor, until they were replaced with independent counsel by order of the District Court. We refer, in another part of this brief, to the fact that we telephoned Tolles, Hogsett and Ginn in August about setting a date for taking testimony on our objections to claims. They stated that Mr. Abbott was away on vacation and *they did not know whether they would represent Mr. Bradley and Mr. Murphy*. Of course, they knew they could not represent these gentlemen who were asserting a huge claim against the debtor whom they also represented, and so the hearings were continued until counsel for Mr. Bradley and Mr. Murphy were selected. Mr. John Fackler finally appeared to state that he represented these claimants and, from that time on, attacks on our committee, its members, its counsel, with motions, briefs, delays and legal gymnastics, were the order of the day. The Master has been conducting hearings on a number of Van Sweringen reorganizations and knows that Mr. Fackler has been a Van Sweringen attorney on real estate and other matters. Mr. Fackler is attorney of record in the Probate Court of Cuyahoga County for the Van Sweringen partnership and individual estates. Hence we have Tolles, Hogsett and Ginn, Van Sweringen attorneys; Mr. Fackler, a Van Sweringen attorney; Harvey Mierke, who has been given hundreds of cases of legal business from the debtor and is beholden to them, all in "friendly" relationship and working closely together.

Now the Master must keep clearly in mind that Bradley and Murphy have a large adverse claim against the debtor, which it is the duty of the debtor and the Preferred Stockholders to resist. It must also be kept in mind that Charles L. Bradley is President of the Debtor Company. Would it not be doing violence to reason to expect the debtor's counsel, Tolles, Hogsett and Ginn, to bona fide resist and oppose the Bradley-Murphy claims, or to expect the Mierke Committee, who are clearly beholden to

Mr. Bradley for the legal business Mr. Mierke is given, to oppose the allowance of his claim.

The Master could not fail to observe, during the course of the hearings, how closely these groups of attorneys operated. When our committee's sworn statements were filed in open Court, Mr. Fackler immediately conferred with Mr. Abbott and called Harvey Mierke from the back wall of the Court room for conference. All of these attorneys represent adverse interests, but, quite obviously, when caught off guard, they provide an indication of how much real opposition there exists among them. In the last hearing, on examination of J. F. Potts, a member of our committee, Mr. Fackler showed him a letter the Higbee Company had written to him and his reply. How did Mr. Fackler come into possession of those letters, unless there was a close liaison between these groups of attorneys? Mr. Fackler would not abstract the letter from the files of The Higbee Company, hence there is no other conclusion but that the letters were given to him by "Friendly" counsel.

We think it should be clear to the Master that the intervention order of July 13th, 1938, should stand, as it provides the only independent representation to the Preferred Stockholders interests and serves to protect their rights in these reorganization proceedings. These motions must be overruled and, now that the claimants have been forced to file their claims, they should be ordered to present their proof in support of these claims. The Committee's Objections may then be heard and the issues adjudicated in an orderly manner.

Respectfully submitted,

BLOOMFIELD AND ORR,

818 Guardian Bldg.,

Main 1376,

*Attorneys for New Preferred
Stockholders Committee.*

Received copy of foregoing Brief this 15th day of December, 1938.

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YOUNG EXHIBIT 3.**Objections to Amended Plan of Reorganization of The Higbee Co. dated September 27, 1940 (November 22, 1940).**

(Case No. 36,119, U. S. D. C., N. D. O.—caption omitted.)

Now come J. F. POTTS and WILLIAM W. BOAG, and represent to the Court that they are the owners of 250 shares and 10 shares respectively of the First Preferred stock of The Higbee Company, debtor herein; that they were until November 7th, 1940, members of the new Preferred Stockholders Committee of The Higbee Company; that they herewith file their objections to the amended plan of reorganization of The Higbee Company dated September 27th, 1940, as follows:

1. Said amended plan is not fair and equitable to the holders of First Preferred stock of the debtor because it provides for the issuance of 10-year 4% notes in the amount of \$500,000.00 to George and Frances Ball Foundation, 10-year 4% notes in the amount of \$100,000.00 to Warren L. Morris, assignee of The Vaness Company, and the Building Company, and 13,233 shares of Common stock to Messrs. Charles L. Bradley and John P. Murphy, all of which purports to be a compromise of pending litigation respecting the ownership and provable amount of the Junior Indebtedness. Said amended plan fails to take cognizance of the question which has been raised in this Court to the allowance of the claim on the Junior Indebtedness, and the assertion that there was fraud in the auction sale of the collateral which included this Indebtedness. Neither does it mention the objections now pending in this Court on behalf of Preferred Stockholders alleging that in no event should said claim be allowed for more than \$600,000.00 (whether to participate in new notes, stock or otherwise) that being the purchase price of the Junior Indebtedness to Charles L. Bradley and John P. Murphy.

On September 21, 1939, the Honorable Paul Jones, Judge of this Court, rendered a decision in the matter of the claim of The Terminal and Shaker Heights Realty Company (formerly Midamerica Corporation) against The Van Sweringen Company in the proceedings for the reorganization of said The Van Sweringen Company pending in

this Court under the Acts of Congress relating to Bankruptcy, No. 37935. Pursuant to that decision this Court, under circumstances similar to those which existed at the time said Midamerica Corporation purchased the Junior Indebtedness of The Higbee Company, denied the claim of the holder of notes of The Van Sweringen Company upon the ground that said Midamerica Corporation, after its purchase of the notes at the aforementioned auction sale on September 30th, 1935, held the notes in a constructive trust for the benefit of the obligor thereof. Final judgment in the District Court of the United States for the Northern District of Ohio, Eastern Division, holding that any claim on notes so purchased must be limited to the amount Midamerica paid for them, was entered in respect of the foregoing claim on February 21, 1940.

On January 22, 1940, the Honorable Paul Jones filed his memorandum opinion with respect to claims asserted by The Terminal and Shaker Heights Realty Company against Van Sweringen Corporation and The Cleveland Terminals Building Company, holding in each case that obligations of those corporations respectively which were purchased by Midamerica Corporation at the same auction sale on September 30th, 1935, could not be enforced against the respective obligors for more than the purchase price to Midamerica Corporation. On February 21st, 1940, final judgment was rendered by the District Court disallowing these claims.

The facts and circumstances surrounding the acquisition of the Junior Indebtedness of The Higbee Company by Midamerica Corporation were similar, if not identical, to the facts and circumstances surrounding the acquisition by Midamerica Corporation of the claims which were litigated in the cases referred to above. Midamerica Corporation paid \$100,000.00 for the Junior Indebtedness at the same auction sale at which it purchased the other securities at a discount. Despite the pendency of Objections to the claims based upon the Junior Indebtedness and despite the aforesaid opinions and orders of the Honorable Paul Jones, District Judge, said amended plan purports to allow the claim based upon the Junior Indebtedness for its full amount and provides for treatment thereof by the issuance of \$600,000.00 of notes and the balance in Common stock.

It is respectfully pointed out to the Court that the treatment provided by said amended plan will presumably satisfy the obligations of Messrs. Bradley and Murphy to George and Frances Ball Foundation and the liabilities of said Bradley and Murphy to the Building Company and The Vaness Company all at the expense of The Higbee Company, giving Messrs. Bradley and Murphy voting control of the reorganized The Higbee Company after a nominal investment of \$60,000.00, whereas the investment of the Preferred Stockholders in The Higbee Company is many times that amount. This should not be tolerated by a Court of Equity, and the claim should be allowed for no more than \$100,000.00, the amount paid for the Junior Indebtedness by Midamerica Corporation. For all of the foregoing reasons said amended plan is unfair and inequitable to the Preferred Stockholders of The Higbee Company.

2. Said amended plan is not fair and equitable to the holders of First Preferred stock of the debtor because it provides for distribution to the holders of Second Preferred stock of shares of a new single issue of preferred stock upon an equal basis with the holders of First Preferred stock, although said Second Preferred stock is presently subordinated both as to dividends and in liquidation to the First Preferred stock.

3. Said amended plan is not fair and equitable to the holders of First Preferred stock because it unreasonably defers the payment of dividends on the new preferred stock provided by said plan until final payment of all of the reorganized company's outstanding indebtedness (other than current or trade indebtedness) as represented by the new notes to be issued to Senior Bank, Senior Rent, and Junior Indebtedness.

4. Said amended plan is not fair and equitable to the holders of First Preferred stock because it provides for the new preferred stock to elect three of seven directors and the Common stock to elect four of the proposed seven directors, although the First Preferred stock and Second Preferred stock are presently entitled to elect the entire Board of Directors.

5. The said amended plan is not fair and equitable to the holders of First Preferred stock because it permits The

Higbee Company to continue the operation of its business as a Delaware Corporation, although all of the business of said corporation is carried on in the State of Ohio, thereby depriving minority stockholders of the right of cumulative voting preserved to them by the Ohio Corporation Law.

6. Said amended plan is not fair and equitable because it fails to comply with Chapter 10, Section 216, of the Acts of Congress relating to Bankruptcy, otherwise known as the Chandler Act, and more particularly with the provisions of Subparagraphs (11) and (12) of said Section 216.

7. Said amended plan is not feasible because it requires payments of interest and amortization of indebtedness which are in excess of debtor's present or reasonably foreseeable earning capacity.

WHEREFORE, Objectors pray that an order be entered finding said amended plan to be neither fair nor equitable to the holders of First Preferred stock and to be not feasible.

Respectfully submitted,

.....
Attorney for Objectors.

STATE OF OHIO,
CUYAHOGA COUNTY, ss:

J. F. POTTS, being first duly sworn, deposes and says that he is one of the Objectors herein; that he has read the foregoing objections and that the statements contained therein are true as he verily believes.

.....
Sworn to before me and subscribed in my presence
this 22nd day of November, 1940.

.....
HAZEL S. KRENZ, *Notary Public.*

YOUNG EXHIBIT 4.

Brief in Support of Objections filed by J. F. Potts and William W. Boag (Preferred Stockholders) to Amended Plan of Reorganization of The Higbee Co. dated September 27, 1940.

(Case No. 36,119, U. S. D. C., N. D. O.—caption omitted.)

OBJECTION NO. 1.

Said Amended Plan is not fair and equitable to the holders of First Preferred stock of the debtor because it provides for the issuance of 10-Year 4% notes in the amount of \$600,000.00 and new common stock of Higbee measured at the rate of one share for each \$100.00 of the principal and interest upon the Junior Indebtedness accrued to the date of final confirmation of the Plan after deducting therefrom the sum of \$600,000.00 to be paid in notes as hereinbefore set forth, said common stock amounting to more than 13,333 shares; both the proposed notes and stock to be issued to and held by such bank or trust company in the City of Cleveland as may be designated by the court, in escrow, pending the determination by litigation or otherwise, of the ownership thereof as among Charles L. Bradley, John P. Murphy, the George and Frances Ball Foundation, Warren L. Morris, assignee of The Vaness Company, and The Cleveland Terminals Building Company, hereinafter referred to as The Building Company, all of which purports to be a compromise so far as Higbee is concerned of the provable amount of the Junior Indebtedness.

There are three very good reasons why this proposed disposition of the Junior Indebtedness is not fair and equitable, to wit:

First. Said Amended Plan fails to take cognizance of the question which has been raised in this court as to whether the Junior Indebtedness should not be treated as a capital advance and subordinated to the First and Second Preferred stock of Higbee, in accordance with the decision in the case of *Taylor, et al., vs. Standard Gas & Electric Co., et al.*, 306 U. S. 307. In that case the first paragraph of the syllabus reads as follows:

“Where the majority of the officers of a subsidiary

affairs of the subsidiary had been managed by the parent corporation over a period of years solely in its own interest with a view to the preservation of its investment therein without regard to the interests of preferred stockholders of the subsidiary, and, as a part of this general scheme to dominate the affairs of the subsidiary, the parent corporation, through the medium of rentals, management fees, interest charges, etc., charged against the subsidiary on an open account basis, had become a creditor of the subsidiary in a large amount, and, the preferred stockholders having had no voice or vote in the management of the affairs of the subsidiary, the latter's financial embarrassment was clearly due to the enormous indebtedness accumulated in favor of the parent corporation and to abuses in management chargeable against it, it is an abuse of discretion for a Federal District Court, in proceedings under Section 77B of the Bankruptcy Act for the reorganization of the subsidiary, to approve a plan of reorganization, based upon a compromise of the claim of the parent corporation as creditor of the subsidiary, by which the parent corporation will retain control of the subsidiary; and under these circumstances no plan should be approved which does not accord the preferred stockholders priority over the parent corporation in the distribution of the assets of the subsidiary and an equal voice with the parent corporation in its management."

In the instant case, The Building Company, a Van Sweringen dominated company, owned all of the common stock of The Higbee Company and by said ownership, dominated The Higbee Company for quite some period of time. During this domination of The Higbee Company The Building Company declared a cash dividend on the common stock of The Higbee Company in the amount of \$675,000.00; without notice to or consent of the Preferred stockholders, caused The Higbee Company to be moved from a highly profitable site to its present location; caused The Higbee Company to abandon a building carried on its books at a value of \$3,000,000.00; caused The Higbee Company to abandon fixtures carried on its books at a value of \$800,000.00; transformed The Higbee Company from

highly successful company with a surplus of over \$2,000,000.00 to a company badly in need of ready cash to carry on business in its new location. The Building Company well knew that the removal of The Higbee Company from its old location to the new location would subject The Higbee Company to great financial expenditures in excess of its available cash and surplus. To promote The Higbee Company in its new location and thus promote other Van Sweringen projects in and about the Public Square of Cleveland, Ohio, The Building Company claims to have advanced to The Higbee Company the sum of \$1,551,041.00, evidenced by promissory notes of The Higbee Company. These notes constitute the present Junior Indebtedness and we claim that said advance to The Higbee Company by The Building Company was a capital contribution. We claim that the facts of the instant case are similar to the facts in the case of *Taylor vs. Standard Gas & Electric Co., supra*, and the rule laid down in that case by the Supreme Court of the United States should be followed in the instant case.

Second. Said Amended Plan fails to take cognizance of the question which has been raised in this court as to the allowance of the claim based on the Junior Indebtedness and of the assertion in connection with said question that there was fraud on September 30, 1935, in the so-called Morgan auction sale of the collateral, including the Junior Indebtedness for the Vaness and Building Company notes.

Should this court hold that the money advanced by The Building Company to The Higbee Company did not constitute a capital advance, then in that event we contend that said Junior Indebtedness should not be recognized in any amount more than \$100,000.00, which was the amount Midamerica paid for said Junior Indebtedness at the auction sale on September 30th, 1935.

On September 21, 1939, the Honorable Paul Jones, Judge of this Court, rendered a decision in the matter of the claim of The Terminal and Shaker Heights Realty Company (formerly Midamerica Corporation) against The Van Sweringen Company in the proceedings for the reorganization of said The Van Sweringen Company pending in this Court under the Acts of Congress relating to Bankruptcy, No. 37935. Pursuant to that decision this Court, under circumstances similar to those which existed at the

time said Midamerica Corporation purchased the Junior Indebtedness of The Higbee Company, denied the claim of the holder of notes of The Van Sweringen Company upon the ground that said Midamerica Corporation, after its purchase of the notes at the aforementioned auction sale on September 30th, 1935, held the notes in a constructive trust for the benefit of the obligor thereof. Final judgment in the District Court of the United States for the Northern District of Ohio, Eastern Division, holding that any claim on notes so purchased must be limited to the amount Midamerica paid for them, was entered in respect of the foregoing claim on February 21st, 1940.

On January 22, 1940, the Honorable Paul Jones filed his memorandum opinion with respect to claims asserted by The Terminal and Shaker Heights Realty Company against Van Sweringen Corporation and The Cleveland Terminals Building Company, holding in each case that obligations of those corporations respectively which were purchased by Midamerica Corporation at the same auction sale on September 30th, 1935, could not be enforced against the respective obligors for more than the purchase price to Midamerica Corporation. On February 21st, 1940, final judgment was rendered by the District Court disallowing these claims.

The facts and circumstances surrounding the acquisition of the Junior Indebtedness of The Higbee Company by Midamerica Corporation were similar, if not identical, to the facts and circumstances surrounding the acquisition by Midamerica Corporation of the claims which were litigated in the cases referred to above. Midamerica Corporation paid \$100,000.00 for the Junior Indebtedness at the same auction sale at which it purchased the other securities at a discount. Despite the pendency of Objections to the claims based upon the Junior Indebtedness and despite the aforesaid opinions and orders of the Honorable Paul Jones, District Judge, said amended plan purports to allow the claim based upon the Junior Indebtedness for its full amount and provides for treatment thereof by the issuance of \$600,000.00 of notes and the balance in Common stock. Under the Reorganization Plan dated September 27th, 1940, it was proposed that the 13,233 shares of common stock were to be given to Messrs. Bradley and Murphy

while under the Amendments dated December 13th, 1940, and now made a part of the Amended Plan dated September 27th, 1940, it is proposed that the new notes in the amount of \$600,000.00 and the common stock be held in escrow. It is to be expected that regardless of how the notes amounting to \$600,000.00 are divided among the George and Frances Ball Foundation, Warren L. Morris, assignee of The Vaness Company, and The Building Company, the common stock will be given to Messrs. Bradley and Murphy, which will give these gentlemen voting control of the Reorganized Higbee Company for a nominal investment of \$60,000.00 whereas the investment of the Preferred Stockholders of The Higbee Company is many times that amount.

It is respectfully pointed out to the Court that the treatment of the Junior Indebtedness provided by said Amended Plan will presumably satisfy the obligations of Messrs. Bradley and Murphy to George and Frances Ball Foundation and the liabilities of the said Bradley and Murphy to The Building Company and The Vaness Company, all at the expense of The Higbee Company. This should not be tolerated by a Court of Equity and the claims should be allowed for no more than \$100,000.00, the amount paid for the Junior Indebtedness by Mid-America Corporation. By no stretch of the imagination do we find any good reason why the \$600,000.00 which Messrs. Bradley and Murphy agreed to pay to George and Frances Ball Foundation for the Junior Indebtedness (the only part of which amount they have paid was the \$60,000.00 down payment) should be used as a yardstick for settlement and compromise of the Junior Indebtedness.

Third. Said Amended Plan fails to take cognizance of or even mention the Objections now pending in this Court on behalf of the Preferred Stockholders alleging that in no event should said Junior Indebtedness be allowed for more than \$600,000.00 (whether to participate in new notes, stock or otherwise), same being the purchase price the said Messrs. Bradley and Murphy agreed to pay for the Junior Indebtedness.

As now proposed, the Plan recognizes every dollar of the Junior Indebtedness though an argument has been put forth to the effect that all recognition over and above

\$600,000.00 has been subordinated to the rights of the First and Second Preferred Stockholders. That is not the truth inasmuch as one of the claims of the First and Second Preferred Stockholders is for back dividends and the common stock issued in lieu of the back dividends is the same common stock to be issued for the greater part of the Junior Indebtedness. Messrs. Bradley and Murphy were important figures in the Van Sweringen operations and especially in The Building Company which dominated the affairs of The Higbee Company and which domination caused The Higbee Company to get into financial difficulties. Messrs. Bradley and Murphy were directors and or officers of Midamerica Corporation which bought the Junior Indebtedness at Public auction on September 30th, 1935. Mr. Bradley was a director and officer of The Higbee Company on June 4th, 1937, when he and Mr. Murphy negotiated the purchase agreement for the Junior Indebtedness with the George and Frances Ball Foundation. It is quite evident that the George and Frances Ball Foundation is willing to accept for the most part, notes of The Higbee Company subordinate to the Senior Debt which makes it conclusive that Mr. Bradley acting in a fiduciary capacity, should have negotiated the purchase of the Junior Indebtedness for The Higbee Company instead of negotiating the same for himself and Mr. Murphy. See *Pepper vs. Litton*, 308 U. S. 295.

We contend that the above mentioned escrow agreement whereby the notes in the amount of \$600,000.00 and common stock in the amount of over 13,233 shares are to be held pending the determination by litigation or otherwise of the ownership thereof as among Messrs. Bradley and Murphy, the George and Frances Ball Foundation, Warren L. Morris, assignee of The Vaness Company, and The Building Company, makes this Amended Plan of Reorganization impossible of acceptance by this Court for the reason that this Court and everybody concerned in the reorganization of The Higbee Company, are entitled to know into whose hands these notes and the common stock are to go. It has been argued in this Court that the Preferred Stockholders should accept this compromise with Messrs. Bradley and Murphy for the reason that the Junior Indebtedness claim might be worth more in the hands of

some other owner. In answer to that argument we recommend that the ownership of the Junior Indebtedness be litigated immediately so that a Plan may be proposed for the reorganization of The Higbee Company wherein all of the cards are on the table and all of the parties concerned are definite and certain. The Higbee Company has done very well under the watchful eye of this Court and it cannot be said that further delay will be detrimental to those interested in the Senior Debt, those interested in the Junior Indebtedness, and the Stockholders of The Higbee Company.

OBJECTION NO. II.

As stated in the Objections, said Amended Plan is not fair and equitable to the holders of the First Preferred stock of the debtor because it provides for distribution to the holders of Second Preferred stock of shares of a new single issue of Preferred stock upon an equal basis with the holders of First Preferred stock although said Second Preferred stock is presently subordinated both as to dividends and in liquidation to the First Preferred stock. Such a proposal is not only unfair but bold and shocking. To us this proposal appears to be a reward to a number of holders of large blocks of Second Preferred stock who have consistently voted for the present management and who have served on or worked with the Preferred Stockholder's Protective Committee of The Higbee Company, which, having been organized by the management, has not resisted the claims of Messrs. Bradley and Murphy to the Junior Indebtedness. See *Case, et al. vs. Los Angeles Lumber Products Co.*, 308 U. S. 106.

OBJECTION NO. III.

Since filing our Objections in this matter, Amendments relating to the preferred dividends have been submitted but said Amendments still do not take care of our Objections. We contend that said Amended Plan as amended, is not fair and equitable to the holders of the First Preferred stock because it unreasonably defers the payment of dividends on the new preferred stock until final payment of all of the reorganized company's outstanding indebtedness, as represented by the new notes to be issued to Senior Bank,

Senior Rent, and Junior Indebtedness. Such a Plan is not in line with the practices of good business. Certainly the new preferred stock should begin to receive dividends not later than the time when the Senior Bank and Senior Rent indebtednesses have been paid.

OBJECTION NO. IV.

As stated in our Objections, said Amended Plan is not fair and equitable to the holders of First Preferred stock because it provides for the new preferred stock to elect three of seven directors and the common stock to elect four of the seven directors, although the First Preferred stock and the Second Preferred stock are presently entitled to elect the entire Board of Directors. We contend that so long as dividends are not paid on the new preferred stock, then that stock should elect the entire Board of Directors. That after dividends are resumed on the Preferred stock and so long as same are paid, then in that event it would not be unfair to have the common stock elect the entire Board of Directors.

OBJECTION NO. V.

As stated in our Objections, the said Amended Plan is not fair and equitable to the holders of First Preferred stock because it permits The Higbee Company to continue the operation of its business as a Delaware Corporation, although all of the business of said corporation is carried on in the State of Ohio, thereby depriving minority stockholders of the right of cumulative voting preserved to them by the Ohio Corporation Law.

OBJECTION NO. VI.

Since our Objections were originally filed, the Amended Plan has been further Amended and some of the requirements of subparagraph 12 of Section 216 of the Chandler Act, not heretofore complied with, have been met. However, the requirements of subparagraph 11 that voting rights be consistent with public policy and in the public interest have not been complied with. The Court is respectfully referred to the discussion set forth above under Objection No. IV for a statement of our position concerning voting rights.

OBJECTION NO. VII.

As stated in our Objections, said Amended Plan is not feasible because it requires payments of interest and amortization of indebtedness which are in excess of debtor's present or reasonably foreseeable earning capacity.

Respectfully submitted,

.....
*Attorney for J. F. Potts and
William W. Boag.*

YOUNG EXHIBIT 5.**Application of Potts and Boag for Appointment of Special Counsel for Debtor (December 19, 1940).**

(Case No. 36,119, U. S. D. C., N. D. O.—caption omitted.)

Now come J. F. POTTS and WILLIAM W. BOAG, and respectfully represent to the court that they are the owners of 250 shares and 10 shares respectively of the First Preferred stock of The Higbee Company, debtor herein; that they herewith make application for the appointment of special counsel for the debtor company for the following reasons:

1. Present counsel for debtor, Messrs. Jones, Day, Cockley and Reavis, presently occupy and for the entire duration of these Reorganization Proceedings have occupied, positions which conflict with their duties and obligations to the debtor as its counsel herein; that because of these conflicting positions it is impossible for said counsel to render adequate and impartial service to the debtor in the performance of the necessary duties which must be performed in connection herewith.

2. On and prior to August 9th, 1935, and thereafter until September 30th, 1935, the notes representing the Junior Indebtedness of debtor, were owned by The Vaness Company and The Cleveland Terminals Building Company,

subject however, to a pledge of said notes to J. P. Morgan & Co.; that during said period Messrs. Tolles, Hogsett & Ginn, the predecessor firm of Messrs. Jones, Day, Cockley & Reavis, of which Gardner Abbott, Esq., is a member, were general legal counsel for both said The Vaness Company and The Cleveland Terminals Building Company.

3. That from October 1st, 1935, to April 1937, the said Junior Indebtedness was owned by Midamerica Corporation, an Ohio corporation, and that during said period said firm of Tolles, Hogsett & Ginn were general counsel for said Midamerica Corporation.

4. On or about April 5th, 1937, said Junior Indebtedness was transferred to George and Frances Ball Foundation, an Indiana Corporation, which held said Junior Indebtedness until the transfer thereof to Messrs. C. L. Bradley and John P. Murphy on June 4th, 1937; that during said period and thereafter to the present time, Messrs. Tolles, Hogsett & Ginn (now Jones, Day, Cockley & Reavis) have represented said George and Frances Ball Foundation as legal counsel in many matters and particularly in all matters with respect to the interest of said George and Frances Ball Foundation in and to securities of the corporations known to be contained in the so-called Van Sweringen group of corporations, including the interest of said George and Frances Ball Foundation in The Higbee Company, debtor herein.

5. The said Junior Indebtedness was transferred to Messrs. C. L. Bradley and John P. Murphy pursuant to the terms and conditions of a bill of sale and a contract or a promissory note, copies of which are attached hereto and marked Exhibits "A" and "B," respectively; that Messrs. C. L. Bradley and John P. Murphy failed to make the payments of principal required to be paid by the contract or promissory note (Exhibit "B") and that George and Frances Ball Foundation has thereby an interest in the collateral for said contract or promissory note and have filed herein a proof of claim with respect thereto.

6. On September 21, 1939, the Honorable Paul Jones, Judge of this court, rendered a decision in the matter of the claim of The Terminal & Shaker Heights Realty Company (formerly Midamerica Corporation), against The Van Sweringen Company in the Proceedings for the Re-

organization of said The Van Sweringen Company pending in this court. On January 22nd, 1940, the Honorable Paul Jones rendered a decision in the matters of the claims of The Terminal & Shaker Heights Realty Company against The Van Sweringen Corporation and The Cleveland Terminals Building Company in the proceedings for the Reorganization of those corporations, also pending in this court. Both of said decisions limited claims based upon obligations purchased by Midamerica Corporation on September 30th, 1935, to the amount which said Midamerica Corporation had paid for said claims respectively on that date. Said decisions cast great doubt upon the validity of the claims filed by Messrs. Bradley and Murphy and George and Frances Ball Foundation for the reason that such claims were purchased by Midamerica Corporation for a total purchase price of \$100,000.00 under the same circumstances and at the same time that said Midamerica Corporation purchased the claims against The Van Sweringen Company, The Van Sweringen Corporation and The Cleveland Terminals Building Company, which were the subject of the decisions of the Honorable Paul Jones, mentioned above.

7. It has also been asserted by Preferred Stockholders in these proceedings that the so-called Junior Indebtedness, in truth and in fact, represents a contribution to the capital of The Higbee Company at the time the payments represented by said Junior Indebtedness were made.

8. Mr. C. L. Bradley has been a Director of The Higbee Company for many years and was a Director during the period within which all of the events hereinbefore recited, occurred. He presently occupies the position of President of the company and is its Chief Executive, and as such, he has authority to employ or discharge the company's legal counsel.

9. Despite the great doubt cast upon the validity of the claims based upon the Junior Indebtedness which have been filed herein, and despite the purchase by Messrs. C. L. Bradley and John P. Murphy of said Junior Indebtedness and their agreement to pay \$600,000.00 for claims against The Higbee Company in the face amount of \$1,551,041.66, plus interest, no effort has been made at any time by

present counsel for the debtor, to bring before the court the validity or provability of said indebtedness, and in fact, efforts by Preferred Stockholders to do so have been resisted by such counsel.

WHEREFORE, Applicants respectfully pray that this court appoint special counsel to give independent judgment and consideration and to take all necessary and appropriate action to safeguard the interests of debtor with respect to the claims based upon said Junior Indebtedness and with respect to all other matters in these Reorganization Proceedings.

J. F. POTTS, *Attorney for Applicants.*

STATE OF OHIO,
CUYAHOGA COUNTY, SS.

J. F. POTTS being first duly sworn deposes and says that he is one of the Applicants above named, and that the allegations contained in the foregoing Application are true to the best of his knowledge and belief.

.....

SWORN to before me and subscribed in my presence this 19th day of December, 1940.

HAZEL S. KRENZ, *Notary Public.*

YOUNG EXHIBIT 6.

Brief in Support of Application for Appointment of Special Counsel for Debtor.

(Case No. 36,119, U. S. D. C., N. D. O.—caption omitted.)

In connection with our application for the appointment of Special Counsel for debtor, testimony was taken in support thereof before the Special Master on January 9th, 1941, and that testimony not only substantiated all the pertinent allegations and statements of fact in our application but brought forth some new pertinent facts.

The law firm of Jones, Day, Cockley & Reavis, and/or its predecessor (hereinafter no reference will be made to predecessor firm but if time element required, same will be inferred), has represented The Higbee Company since 1928.

The law firm of Jones, Day, Cockley & Reavis, on or about September 30th, 1935, organized Midamerica and represented that company thereafter, though Midamerica had purchased at the so-called Morgan Auction Sale on September 30, 1935, the so-called Junior Debt of The Higbee Company. During the existence of Midamerica, Charles L. Bradley and John P. Murphy served as officers of that corporation.

On or about May 4th, 1937, the George and Frances Ball Foundation (hereinafter called the Ball Foundation), acquired, among other assets, the Junior Debt of The Higbee Company from Midamerica. Shortly after the Ball Foundation acquired the so-called Van Sweringen securities, including the Junior Debt of The Higbee Company, the firm of Jones, Day, Cockley & Reavis was retained as legal counsel for said Ball Foundation, and this relationship has continued to the present time.

On or about June 4th, 1937, the law firm of Jones, Day, Cockley & Reavis, acting for its client the Ball Foundation, negotiated the sale of the Junior Debt and common stock of The Higbee Company, together with a \$69,673.71 participation in a \$523,043.51 note of The Higbee Company due March 1st, 1934, to Charles L. Bradley and John P. Murphy, for all of which Messrs. Bradley and Murphy agreed to pay \$600,000.00, with a down payment of \$60,000.00, the balance represented by notes. To secure said notes, the Ball Foundation retained the subject matter of the sale.

It is logical to presume that the law firm of Jones, Day, Cockley & Reavis, while negotiating this sale, represented to Messrs. Bradley and Murphy that the Junior Debt of The Higbee Company could and would be asserted in the reorganization of The Higbee Company to the full extent of its face value. Is it any wonder then that the Amended Plan of Reorganization drafted by this same firm of lawyers and filed on April 14th, 1938, provided for a dollar for dollar recognition of the said Junior Debt in the hands of Messrs. Bradley and Murphy.

Is it any wonder then that Attorney Abbott, a member of the law firm of Jones, Day, Cockley & Reavis, has not to this day filed one paper in this court wherein The Higbee Company contested one cent of the claims asserted by Messrs. Bradley and Murphy in connection with the said Junior Debt, though the said Attorney Abbott has testified under oath to the effect that he had grave doubt that the Junior Debt could be asserted in this reorganization for more than \$600,000.00 in the hands of the said Messrs. Bradley and Murphy.

The fact that Mr. Bradley has been a Director of The Higbee Company since 1933, and the fact that Mr. Murphy has been a Director of The Higbee Company since 1937, and the fact that Mr. Bradley has been President of The Higbee Company since September 1937, and no doubt as Chief Executive of said Company has had the power to retain and remove legal representation, have unquestionably influenced Attorney Abbott in his failure to resist in any respect the Junior Debt in the hands of Messrs. Bradley and Murphy.

After Messrs. Bradley and Murphy defaulted on a payment to the Ball Foundation of \$120,000.00 due May 15th, 1938, the law firm of Jones, Day, Cockley & Reavis advised its client the Ball Foundation, that a formal claim should be asserted by it in The Higbee Company proceedings and arranged with Attorney Charles S. Wachner to lodge said claim. To us, especially in view of later developments wherein the firm of Jones, Day, Cockley & Reavis continued to represent the Ball Foundation as legal counsel in matters connected with The Higbee reorganization, this move appears to be just so much window dressing and as such, a knowingly gross misrepresentation and imposition on this Court and a knowingly unfair, misleading and insincere representation to this Court.

Warren L. Morris as assignee for the benefit of creditors of The Vaness Company, has lodged a lawsuit in the State of Indiana against the Ball Foundation in connection with the purchase of the so-called Van Sweringen securities by the Ball Foundation from Midamerica. The firm of Jones, Day, Cockley & Reavis appears as attorneys of record for the Ball Foundation in this lawsuit. Special counsel for The Cleveland Terminal Building Company has

made claims against the Ball Foundation and threatened to sue the Ball Foundation in connection with the same transaction. During the last six months and especially since the last Amended Plan of Reorganization of The Higbee Company was filed on September 27, 1940, the law firm of Jones, Day, Cockley & Reavis has negotiated as legal representative of the Ball Foundation with attorneys for Warren L. Morris and Cleveland Terminal Building Company in an effort to settle the so-called Vaness and Cleveland Terminal Building Company claims against the Ball Foundation by allocating the \$500,000.00 worth of new notes, which the same law firm recommended that The Higbee Company issue as part of the payment on the Junior Debt. *Inasmuch as said law firm's client, Ball Foundation, is to receive the full purchase price and more, agreed upon for the Junior Debt by Messrs. Bradley and Murphy, is there any wonder that the firm of Jones, Day, Cockley & Reavis has drafted the present Plan of Reorganization of The Higbee Company wherein The Higbee Company is to issue \$600,000.00 worth of 4% notes together with more than 13,233 shares of common stock, to satisfy the Junior Debt.*

This Plan of Reorganization was drafted by this law firm though said firm well knew that * * * (1) the "defense of capital advance," as decided in the case of *Taylor vs. Standard Gas & Electric Company*, 306 U. S. 307, could have in good faith been asserted against the Junior Debt * * * (2) *together with the defense* that the Junior Debt should never be allowed *in the hands of anyone* for more than Midamerica paid for it as was decided by this Court in the matter of Van Sweringen Corporation, Debtor, and The Cleveland Terminal Building Company, Subsidiary Debtor, a Reorganization matter wherein claims were presented very similar to the Junior Debt in the instant case.

Part of the testimony given by Thomas H. Jones of the law firm of Jones, Day, Cockley & Reavis, at the above mentioned examination, reads as follows:

"Q. Now, in matters since the Ball Foundation filed its claim against Higbee in these reorganization proceedings in the name of Mr. Wachner, have you represented the Ball Foundation in any negotiations whatsoever involving the disposition of the Higbee notes?

A. Well, are you referring to the sale of the Higbee notes to Murphy and Bradley?

Q. No. I mean the proposed new notes to be issued by The Higbee Company in this new plan of reorganization.

A. Yes. I have discussed with representatives of the Vaness Company and C.T.B. the allocation of whatever notes should be issued under the plan in respect to the junior debt.

Q. Have you discussed those plans in conjunction with or with the knowledge of Mr. Abbott who is representing The Higbee Company?

A. You mean the allocation of the notes?

Q. Yes; and the number of notes to be issued and to whom they are to be issued?

A. No; I have never discussed that. As a matter of fact, I have never to this day read the Higbee plan. I know very little about it. The discussions that I have had have been on the basis of the provision in the plan for the issuance of \$600,000 of junior notes.

Q. But, as a legal representative, legal counsel, for Ball Foundation, you are interested in the number of notes which The Higbee Company proposes, or the amount of notes The Higbee Company proposes to issue for the junior debt, is that right?

A. Well, I certainly am not legally interested, because I don't represent that claim. What my personal feelings may be isn't the thing you are after, I presume.

Q. No; but, Mr. Jones, you are representing the Ball Foundation in an effort to get rid of a lawsuit in Indiana brought by the trustee of Vaness.

A. That is right.

Q. And a lawsuit brought by C.T.B., or a claim made by C.T.B. and you are interested in the Ball Foundation to the extent that they are interested in the junior debt, inasmuch as Messrs. Bradley and Murphy have not paid the purchase price, aren't you?

A. Yes."

Rule 6 of Canons of Professional Ethics adopted by the American Bar Association and printed September 30th, 1937, reads in part as follows:

“ * * * It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.”

The firm of Jones, Day, Cockley & Reavis violated the above Canon of Professional Ethics in the following respects, to-wit:

1. When it accepted employment as legal counsel from its client the Midamerica Corporation, during the time said client owned the Junior Debt and other obligations of The Higbee Company.

2. When it accepted employment as legal counsel from its client the Ball Foundation when said client owned or had an interest in the Junior Debt or other obligations of The Higbee Company.

3. When it negotiated the sale of the Junior Debt and other obligations of The Higbee Company to Messrs. Bradley and Murphy, for its client the Ball Foundation.

4. When it continued to represent its client the Ball Foundation in numerous matters including those affecting The Higbee Reorganization after said firm had given this Court and all other persons interested, the impression that Charles S. Wachner was representing the Ball Foundation, by making him the attorney of record for the Ball Foundation in these Proceedings.

5. When it continued to represent its client the Ball Foundation in negotiations wherein notes to be issued by The Higbee Company in its Reorganization Plan were being allocated to different claimants against the Ball Foundation.

In each and every one of these matters above referred to, the firm of Jones, Day, Cockley & Reavis should have made a complete disclosure of all the facts to all parties interested, including this Court, and unless it received the consent of all parties interested and this Court, to continue as counsel for The Higbee Company, it should have withdrawn from the Proceedings as such.

Under the facts disclosed by the testimony submitted to this Court on January 9th, 1941, by no stretch of the imagination can it be said that The Higbee Company as such has had impartial, independent, and unshackled legal representation.

We urge that the firm of Jones, Day, Cockley & Reavis be relieved of further legal representation of The Higbee Company, that Special Counsel be appointed immediately and that said Special Counsel be instructed to assert each and every defense which may exist against the Junior Indebtedness consistent with the existing facts to the end that a fair, equitable and feasible Plan of Reorganization may be worked out for The Higbee Company.

Respectfully submitted,

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.....
Attorneys for J. F. Potts and William W. Boag.

YOUNG EXHIBIT 7.

Objections and Exceptions of Potts and Boag (Preferred Stockholders) to Ad Interim Report of Special Master Recommending Approval of Amended Plan of Reorganization (February 10, 1941).

(Case No. 36,119, U. S. D. C., N. D. O.—caption omitted.)

*To The Honorable Paul Jones and Robert N. Wilkin,
Judges of the District Court of the United States
for the Northern District of Ohio, Eastern Division:*

Now come J. F. Potts and William W. Boag, holders of 250 shares and 10 shares respectively of the First Preferred Stock of the debtor, and respectfully object and except to the ad interim Report of the Honorable William B. Woods, Special Master, recommending approval of the amended plan of reorganization and to the over-ruling of objections to said amended plan upon the grounds and for the reasons that the Special Master erred as hereinafter set forth:

EXCEPTION 1.

The Special Master erred in finding that the alleged Junior Indebtedness did not constitute a capital advance and in refusing to subordinate said Junior Indebtedness to the First and Second Preferred Stock.

EXCEPTION 2.

The Special Master erred in failing to allow the said Junior Indebtedness only in the amount of \$100,000 that being the amount which Midamerica Corporation paid for said Junior Indebtedness at the Morgan Auction Sale on September 30, 1935 when C. L. Bradley was a director both of Midamerica and Higbee, thus occupying conflicting positions.

EXCEPTION 3.

The Special Master erred in approving the Amended Plan insofar as it permits the allowance of claims purchased by C. L. Bradley and J. P. Murphy, pursuant to a contract made and executed while said C. L. Bradley was a director of Higbee, for more than \$600,000, the purchase price to said C. L. Bradley and J. P. Murphy; said claims including the Junior Indebtedness in the present face amount of \$1,551,041.66 and a participation of \$69,673.71 in the Senior Indebtedness.

EXCEPTION 4.

The Special Master erred in holding that there was insufficient evidence in the record to warrant a determination that said Junior Indebtedness was invalid and unenforceable in whole or in part.

EXCEPTION 5.

The Special Master erred in holding that the George and Frances Ball Foundation could cancel the purchase agreement with said Bradley and Murphy and prove the Junior Indebtedness for its full amount.

EXCEPTION 6.

The Special Master erred in approving the amended plan insofar as it permits the holders of a majority of Common Stock to elect a majority of the Board of Directors irrespective of payment or non-payment of dividends on the new Preferred Stock.

EXCEPTION 7.

The Special Master erred in authorizing the issuance to the holders of the Junior Indebtedness of a majority of the Common Stock thereby delivering absolute control of the debtor to said holders.

EXCEPTION 8.

The Special Master erred in not requiring that the articles of incorporation of the reorganized corporation contain provisions authorizing cumulative voting.

EXCEPTION 9.

The Special Master erred in approving a plan which deprives the Preferred Stockholders of the right to elect all of the directors when there is a default in dividends which right they now have.

EXCEPTION 10.

The Special Master erred in holding that said amended plan complies with Section 216 of Chapter X of the Chandler Act.

EXCEPTION 11.

The Special Master erred in approving a plan which does not provide that until all of the notes issued under the plan, together with all of the cumulated and current dividends on the New Preferred Stock have been paid, The

Higbee Company shall not in any one fiscal year, pay an aggregate amount for executive salaries in excess of \$75,000.00, said executives shall be deemed to include the President, Vice Presidents, Secretary and Treasurer.

EXCEPTION 12.

The Special Master erred in approving a plan which does not disclose definitely who will eventually own the common stock to be issued for the Junior Debt, which represents a majority of all the common stock to be outstanding and permanent control of debtor.

WHEREFORE Objectors request that the ad interim Report of the Special Master be rejected, that the amended plan of reorganization be disapproved and that the objections thereto be sustained.

Respectfully submitted,

J. F. POTTS,

JOHN H. MCNEAL,

Attorneys for Objectors.

Dated: February 10th, 1941.

Copies of aforesaid Objections mailed this day to the following attorneys of record in these proceedings:

Jones, Day, Cockley & Reavis, Attys. for Debtor,
1759 Union Commerce Bldg.,

Bushnell, Burgess & Fulton and R. F. Fullmer, Attys. for
Cleveland Trust Company, Trustee for the Metropolitan Life Insurance Company,
1250 Terminal Tower Bldg.,

Sawyer, Cummings, Mook & Douglas, Main Office E. 9th
& Euclid Ave. and Baker, Hostetler and Patterson,
Attys. for Cleveland Trust Co.,
Union Commerce Bldg.,

Davis, Polk, Wardwell, Gardiner & Reed, New York City,
and Baker, Hostetler & Patterson, Attorneys for J. P.
Morgan & Co.,
Union Commerce Bldg.,

Baker, Hostetler & Patterson, Attys. for The Cleveland
Trust Co., Assignee of Midland Bank,
Union Commerce Bldg.,

Oliver Stamper, Attorney for Union Bank of Commerce,
Union Commerce Bldg.,

Chas. F. Carr and Addison H. Brennan, Attorneys for
Rodney P. Lien, Superintendent of Banks, liquidating
The Guardian Trust Company,
Guardian Building,

Edmund Burke, Jr. and Wm. R. Sherwood, Attys. for Securities & Exchange Commission,
1370 Ontario Street,

Fackler & Dye, Attys. for Charles L. Bradley and John P. Murphy,
308 Euclid Avenue,

Glen O. Smith, Atty. for Warren L. Morris, Assignee of
The Vaness Company,
Union Commerce Bldg.,

Harvey O. Mierke, Chairman of Committee of Preferred
Stockholders,
Union Commerce Bldg.,

M. B. and H. H. Johnson, Attys. for Preferred Stockholders
Committee,
Union Commerce Bldg.,

Bloomfield & Orr, Attys. for New Committee of Stockholders,
Guardian Building,

I. Walter Sharp, and Hauxhurst, Inglis, Sharp & Cull,
Attys. for Cleveland Terminals Building Company,
Bulkley Building,

Everett Warner,
403 Western Reserve Bldg., Muncie, Ind., and

Charles S. Wachner,
1734 Union Commerce Bldg., Attys. for George
and Frances Ball Foundation,

Ewing & Hecker, Attys. for Estate of Charles M. Kenney,
Preferred Stockholder,
Guardian Building,

Squire, Sanders & Dempsey, Attys. for Cleveland Railway
Company,
Union Commerce Bldg.,

R. W. Purcell, Atty. for Terminal and Shaker Heights
Realty Company,
Terminal Tower Bldg.

YOUNG EXHIBIT 8.

Brief in Support of Objections and Exceptions of Potts and Boag (Preferred Stockholders) to Ad Interim Report of Special Master Recommending Approval of Amended Plan of Reorganization (February 13, 1941).

(Case No. 36,119, U. S. D. C., N. D. O.—caption omitted.)

To the Honorable Paul Jones and Robert N. Wilkin, Judges of the District Court of the United States for the Northern District of Ohio, Eastern Division:

For the convenience of the court and for the sake of brevity, we will hereinafter refer to

The Higbee Company as "Higbee" when not referred to as Debtor

The Vaness Company as "Vaness"

The Cleveland Terminal Building Company as "CTB"

George and Frances Ball Foundation as "Ball Foundation"

O. P. and M. J. Van Sweringen and Associates as the "Van Sweringens."

EXCEPTION 1.

The Junior Indebtedness Should be Treated as a Capital Advance.

In connection with our Exception No. 1, it will be necessary to recite a somewhat detailed history of the acquisition of Higbee by the Van Sweringens and the removal of said store from East 13th Street and Euclid Avenue, to the Public Square site.

For several years prior to 1929, the Van Sweringens had scoured the country in an effort to obtain a department store tenant for a proposed building to be erected on land owned by them at the corner of Ontario Street and the Public Square, Cleveland, Ohio. Among the department stores propositioned during this attempt to get a tenant were Macy's of New York, Marshall Field of Chicago and Higbee of Cleveland.

Sometime in 1929 or earlier, having been unsuccessful in getting a tenant for its costly public square site, the Van Sweringens, through Vaness, obtained an option to

purchase or purchased all of the outstanding shares of the common stock of Higbee, same being 50,000 shares and at that ~~same~~ having all of the voting powers as to the election of Directors of Higbee, and for which Vaness paid \$7,500,000.00. Sometime in 1930, Vaness sold all of the common stock of Higbee to CTB for \$7,500,000.00, CTB being the company which had title to the building site at the corner of Ontario Street and Public Square. (The Van Sweringens dominated Vaness by stock ownership while Vaness owned all of the stock of CTB.) Though there were no interlocking directors, the Van Sweringens dominated Higbee from the time they obtained an option or actually purchased the common stock of Higbee. Shortly after obtaining control of Higbee, the Van Sweringens caused Higbee to declare a 100% common stock dividend, same being payable on or about April 1st, 1929, at which time, because of said stock dividend, \$1,000,000.00 was charged against the surplus of Higbee.

Early in 1930 the Van Sweringens caused a large sign to be erected on the building site at the corner of Ontario Street and Public Square on which was printed "The Higbee Company's New Store," or words to that effect. In September or October of 1930, a building permit was issued by the City of Cleveland to CTB for the erection of a large department store building at the corner of Ontario Street and Public Square. On or about the 1st day of March 1931, the Van Sweringens caused Higbee to enter into a long term lease with CTB whereby Higbee was to occupy the department store being erected on the Public Square by CTB and for said occupancy, Higbee agreed to pay a minimum of \$600,000.00 a year, plus taxes and interest.

From the time the Van Sweringens obtained control of Higbee and began their domination of said company up to and including April 1st, 1931, they caused Higbee to declare and pay cash dividends on the Higbee common stock in a total amount of \$675,000.00, the last of said dividends amounting to \$75,000.00 being paid as late as April 1st, 1931. This total amount of \$675,000.00 paid in cash dividends on the Higbee common stock, was paid to Vaness and/or CTB.

These dividends amounting to \$675,000.00 were taken out of the treasury of Higbee when the Van Sweringens well knew that Higbee was soon to move into its new quarters on the Public Square which were many times larger than its old quarters at East 13th Street and Euclid Avenue, and the Van Sweringens well knew that in said new quarters Higbee, under their domination, was to expand its field of operations and the Van Sweringens well knew that said move and expansion would cost Higbee at least \$1,500,000.00.

Having raided and depleted the treasury of Higbee in the amount of \$675,000.00 and in order to move Higbee into its new store, and to launch Higbee in its expanded operations, the Van Sweringens, through CTB and/or Vaness claim to have loaned Higbee on the following dates, the following amounts, to-wit:

On August 14, 1931.....	\$250,000.00
On August 21, 1931.....	250,000.00
On September 3, 1931.....	250,000.00
On September 21, 1931.....	250,000.00
On October 10, 1931.....	500,000.00

and for said advance, took one year notes of Higbee in the total amount of \$1,500,000.00.

All of which was done without the knowledge or consent of the Higbee Preferred Stockholders who had no voice or vote in the management affairs of Higbee. By advancing the \$1,500,000.00 to Higbee and taking notes for same, the Van Sweringens created a creditor-debtor relationship between CTB and Higbee which, coupled with a long term lease signed by Higbee with CTB, assured the Van Sweringens continued control and domination of Higbee whether or not the future dividends were paid on the First and Second Preferred Stock. The Van Sweringens, through CTB, caused Higbee to move into its new quarters on the Public Square on or about September 1st, 1931, and thereby caused Higbee to abandon a building carried on its books at a value of \$3,000,000.00; and thereby caused Higbee to abandon fixtures carried on its books at a value of \$800,000.00; and thereby transformed Higbee by raiding the treasury to the extent of \$675,000.00, from a highly successful company with a surplus of over \$2,000,000.00 to a

company badly in need of cash to carry on its business in its new location.

Within two years from the time the Van Sweringens forced Higbee to move into its new location on the Public Square, the Higbee surplus of over \$2,000,000.00 was changed to a deficit of approximately \$4,500,000.00.

Besides all of the above, the Van Sweringens, through their domination of Higbee, caused Higbee to breach its long term lease with its totally owned subsidiary company, The Higbee Realty Company, or the 1277 Euclid Avenue Realty Company, as a result of which breach a judgment was rendered against Higbee on July 31, 1935, in the Common Pleas Court of Cuyahoga County, in the case of *North, et al., vs. The Higbee Company* for an amount approximately \$769,000.00 together with interest. This judgment was affirmed by the Court of Appeals but by four to three vote in the Supreme Court of Ohio, final judgment was rendered for Higbee. This lawsuit cost Higbee thousands of dollars which can well be charged to the domination of Higbee by the Van Sweringens.

All of the above acts which were possible of accomplishment only by the complete domination by the Van Sweringens of Higbee through the ownership of all the common stock of Higbee and further all of the above acts were done wholly and solely for and in behalf of the promotion of the Van Sweringen development on around and near the Public Square together with their Rapid Transit Company already in existence and its proposed expansion.

On February 27th, 1939, the Supreme Court rendered a decision in the case of *Taylor, et al. vs. Standard Gas & Electric Co., et al.*, 306 U. S. 307, the operative facts of which case are on all fours with the facts in the instant case in which said court held that monies advanced by the dominating company should be treated as a capital advance and be subordinated to the Preferred Stock of the debtor. The first paragraph of the syllabus of that case reads as follows, to-wit:

“Where the majority of the officers of a subsidiary corporation were officers of the parent corporation, the affairs of the subsidiary had been managed by the parent corporation over a period of years solely in its own interest with a view to the preservation of its invest-

ment therein without regard to the interests of preferred stockholders of the subsidiary, and, as a part of this general scheme to dominate the affairs of the subsidiary, the parent corporation, through the medium of rentals, management fees, interest charges, etc., charged against the subsidiary on an open account basis, had become a creditor of the subsidiary in a large amount, and, the preferred stockholders having had no voice or vote in the management of the affairs of the subsidiary, the latter's financial embarrassment was clearly due to the enormous indebtedness accumulated in favor of the parent corporation and to abuses in management chargeable against it, it is an abuse of discretion for a Federal District Court, in proceedings under Section 77B of the Bankruptcy Act for the reorganization of the subsidiary, to approve a plan of reorganization, based upon a compromise of the claim of the parent corporation as creditor of the subsidiary, by which the parent corporation will retain control of the subsidiary; and under these circumstances no plan should be approved which does not accord the preferred stockholders priority over the parent corporation in the distribution of the assets of the subsidiary and an equal voice with the parent corporation in its management."

Vaness was a Van Sweringen dominated company; Vaness owned all of the stock of CTB and through Vaness and CTB the Van Sweringens dominated Higbee from some time early in 1929 when Vaness purchased all of the common stock of Higbee, until June 1932, when the Preferred Stockholders elected a Board of Directors, during which time all of the acts recited above and of which we complain, took place.

The Special Master in his Report (p. 10) has this to say:

"The objectors cite three reasons why this disposition of the Junior Indebtedness is unfair. The first is that the Junior Indebtedness should be treated as a capital advance and therefore subordinated to the First and Second Preferred Stock of Higbee. *In spite of the fact that ample opportunity was given, the objectors introduced no evidence whatsoever in support of this*

proposition nor is there any evidence in the record of these proceedings in support thereof."

As to whether or not we should have introduced any more evidence concerning the above facts and as to whether or not there is any evidence whatsoever in the record concerning these facts, we wish to refer the court to 383 pages of testimony which were taken in these proceedings before the Special Master relative to lease of premises from CTB to Higbee; declarations and payments of cash dividends in the amount of \$675,000.00; the declaration of a stock dividend of 50,000 shares of common stock of Higbee and the charging of the surplus to the extent of \$1,000,000.00 for same; the creation of the Junior Debt and other matters relating thereto, and many other facts above recited and complained of; same having been taken on March 2, 1939; March 15, 1939; April 26, 1939 and May 5th, 1939; all of which testimony was filed with the Special Master. Besides the 383 pages of testimony, 18 exhibits were introduced and filed as a part of said evidence. Most of the evidence contained in the 383 pages was introduced by the New Committee of Preferred Stockholders of which the Objectors were members at the time.

The Special Master argues in his Report (p. 10) that the Preferred Stockholders of Higbee examined and ratified the Refunding and Rental Agreement of January 1st, 1935, and at the same time expressly recognized therein the validity and the amount of the Junior Indebtedness. We wonder if the Special Master wants to convey the idea to this court that the Preferred Stockholders should have asserted the defense of capital advance in 1935, when as a matter of fact the Supreme Court of the United States did not render its decision in *Taylor et al. vs. Standard Gas & Electric Co., et al., supra*, until February 27, 1939. Not having injected such a defense to the Junior Debt in 1935, we wonder if the Special Master is now of the opinion that the Preferred Stockholders should be estopped from raising the question in these proceedings at this time. The Special Master further argues in his report (p. 10) that in the *Taylor* case the parent corporation completely dominated the subsidiary and used it as an instrumentality. If the above recited facts do not indicate complete domination of Higbee by Vaness and CTB during the time each re-

spectively held all of the common stock of Higbee, we know of no stronger evidence existing or that could exist. Vaness paid \$7,500,000.00 for the common stock of Higbee, and Higbee at that time was not reasonably worth more than \$5,000,000.00. There was \$2,000,000.00 worth of Preferred Stock ahead of the common stock. Therefore Vaness paid \$7,500,000.00 for a block of stock which had a possible value of \$3,000,000.00. If the Van Sweringens did not intend to dominate Higbee and move it to their Public Square development, why did they pay the \$4,000,000.00 more than said common stock was reasonably worth.

The Special Master further argues in his report (p. 10) that the Preferred Stockholders in the *Taylor* case did not have knowledge of the indebtedness between the parent and subsidiary corporation and infers that the Preferred Stockholders of Higbee had knowledge of the Junior Indebtedness. If such was the case in the *Taylor* case, we find nothing in the report which would indicate that this fact in any way influenced the court in its decision. It may be true, although as to this we have no knowledge nor does the record enlighten us, that some of the Preferred Stockholders were aware of the existence on the balance sheet or in the Refunding and Rental Agreement of 1935, of an item which is now referred to as the Junior Indebtedness, but certainly it was not until these Reorganization Proceedings that the facts showing the shady and unsavory origin of that so-called Indebtedness were developed and it is in these Reorganization Proceedings that relief is asked and should be granted. Certainly that is the purpose of the Bankruptcy Act and it should not be the duty of any stockholder to make independent investigation at any time. The facts now having been produced, however, this tribunal should exercise the discretion so properly vested in it and grant whatever relief may be appropriate.

In view of all of these facts which are similar to the pertinent facts in the case of *Taylor et al. vs. Standard Gas & Electric Co., et al., supra*, we contend and respectfully urge that no Plan in the Reorganization of Higbee can be considered fair and equitable unless said Plan provides for the Junior Indebtedness to be treated as a capital advance and subordinated to the First and Second Preferred Stock.

EXCEPTION 2.

The Claim on the Junior Indebtedness should not be allowed for more than \$100,000.

It is elementary that a director owes fiduciary duties to his corporation. His loyalty must be unqualified and undivided. He cannot commit an act injurious to the welfare of his corporation nor can he join with others in the commission of such act. He cannot place self-interest above the interest of his corporation and if he does so the corporation may require him to account for any profit, or take advantage of the transaction on its own behalf. In line with this doctrine it has been widely held that a director of a corporation in financial difficulty may not purchase at a discount obligations of the corporation and enforce them against the corporation in full. If the citation of authority is required in support of this fundamental principle it would seem unnecessary to go beyond the opinions of this Court rendered in the reorganization proceedings of The Van Sweringen Company and The Van Sweringen Corporation upon the claims filed by Midamerica Corporation against those debtors respectively. The opinion in *The Van Sweringen Company* case was filed September 21, 1939 and the opinion in *The Van Sweringen Corporation* case was filed January 22, 1940. For other cases see:

In re McCrory Stores Corporation, 12 Supp. 267 (D. C. S. D. N. Y. 1935);

Higgins vs. Lansingh, 154 Ill. 301, 40 N. E. 362 (1895);

Bramblet vs. Commonwealth Company, 26 Ky. L. Rep. 1176, 83 S. W. 599 (1904).

Compare:

In re Standard Commercial Tobacco Company, 34 Fed. Supp. 304 (D. C. S. D. N. Y. 1940);

Irving Trust Company vs. Deutsch, 73 Fed. (2nd) 121 (C. C. A. 2nd);

Pepper vs. Litton, 308 U. S. 295.

Facts which have taken place during this reorganization proceeding while the company was operating under the supervision and jurisdiction of the Court bring this case directly within the doctrine of the cases cited above. The

so-called Junior Indebtedness which originated by virtue of the suspicious circumstances set forth above has been transferred about among various parties all interested in these proceedings during the very period of judicial supervision, the name of Charles L. Bradley, a director and now President of the debtor, appearing on both the creditor and debtor sides in several distinct and separate transactions.

Bradley was President and Murphy was Secretary of CTB when that company had fled Higbee, raided its treasury, moved it to its present site and put a mill stone around its neck in the form of a \$1,500,000 loan and a long term lease calling for a rental and tax payment amounting to \$800,000 per year. The \$1,500,000 loan which they claim was necessary after the treasury raid constitutes the principal amount due on the Junior Debt out of which these same two individuals are now attempting to make a large profit at the expense of Higbee.

On September 30, 1935 the Junior Indebtedness, the face amount of which was in excess of \$1,500,000, was purchased by Midamerica Corporation for \$100,000. Mr. C. L. Bradley was a director of Higbee at that time. However, he was also a director of Midamerica and participated with the other directors of Midamerica in the purchase. (See Special Master's Report, page 11.) As a director of Higbee he made no effort to purchase that Indebtedness for Higbee. His loyalty was divided. He could not faithfully perform his duty to Higbee and still participate in the Midamerica purchase. His presence made the entire transaction fraudulent and the fact that he was joined by others who may not have had any obligations to Higbee does not validate the transaction. Higbee was entitled to the benefit of Bradley's best efforts and undivided attention. Not having received this, it is entitled to take advantage of the purchase which Midamerica made. Higbee could have purchased and retired this huge debt for \$100,000 at that time if its director Bradley had exercised good faith. It is wholly unconscionable to allow the claim on the Junior Indebtedness for its full amount, whether to participate in new notes or stock or both, in view of the unsavory background and of Bradley's dual capacity.

Bradley's position in Midamerica and the entire facts and circumstances surrounding that sale were well known

to all parties participating in the reorganization. They appear in the record and have been referred to by the Special Master in his report. Counsel for the debtor were thoroughly aware of them. Furthermore, all parties, including such counsel, knew of the decisions of this court referred to above in the reorganization proceedings of The Van Sweringen Company and of the Van Sweringen Corporation. In spite of this knowledge and in spite of the extremely doubtful nature of the Junior Indebtedness counsel for debtor have failed to take any action to cause a determination to be made of the enforceability of this alleged claim. That they take such action has been urged upon them, and Objectors have even requested the Special Master by formal application to appoint special counsel for debtor who could and would question the claim on this basis. This application, however, was denied only two days before the decision of the Master on the fairness of the plan of reorganization. In view of all of these facts, it is respectfully urged that no plan can be fair and equitable until there has been a determination of the validity of said Junior Indebtedness.

EXCEPTION 3.

In no event should the Junior Indebtedness be allowed for more than \$600,000.

Not content with being on both the creditor and debtor side of the transaction in the Midamerica Corporation purchase, the same C. L. Bradley with one J. P. Murphy (also a former Midamerica officer), on June 4, 1937 purchased from Ball Foundation the said Junior Indebtedness for an agreed purchase price of \$600,000. The details of the transaction are briefly as follows: Ball Foundation which had become the owner of certain Higbee interests sold them to Bradley and Murphy for a total purchase price of \$600,000 of which \$60,000 was paid in cash and the balance represented by a promissory note. The securities remained with Ball Foundation as collateral for the note. The securities so sold and repledged included not only the Junior Indebtedness for over \$1,500,000 above referred to, but also a participation in the amount of \$69,673.71 in the Senior Indebtedness of Higbee and 100,000 shares of the company's common stock. Incidentally, it is interesting

to note that the plan fails to mention the aforesaid \$69,673.71 participation as belonging to Bradley and Murphy although when this participation has been paid in full within three years as provided in the plan said Bradley and Murphy will have received back more than the number of dollars so far invested by them and anything they receive in addition will be clear profit at the expense of Higbee.

The cases cited above with respect to the Midamerica purchase apply with even greater force here. Bradley was a director of Higbee when he and Murphy purchased this Indebtedness at a discount, yet the plan provides for its allowance in full. Counsel for debtor testified at the hearing upon the application for the appointment of Special Counsel that he had great doubts as to the allowability of this claim. Nevertheless, he filed the second amended plan which provided for its allowance in full. His only justification for such conduct was that he was filing that plan in accordance with the terms of the "Refunding and Rental Agreement" of 1935. Yet it must be perfectly apparent to all that if there is a defense to a claim in a reorganization proceeding it is the duty of debtor's counsel to file objections to it even though there is a note or contract outstanding reciting the existence of the Indebtedness, or the books of the debtor acknowledge it. Was the debtor then receiving the benefit of independent and unbiased legal advice or was debtor's counsel considering the welfare of its other admitted client the Ball Foundation? The justification for the allowance in full of the claim on the Junior Indebtedness in the present plan was stated both by debtor's counsel and by the Special Master in his report (p. 11) that because of default in the note from Bradley and Murphy to Ball Foundation, Ball Foundation "has the right to cancel the contract and to take over the notes representing the Junior Indebtedness and common stock of the Higbee Company." Debtor's counsel at least was or should have been fully aware that the Bradley-Murphy note to Ball Foundation contained no provision whereby Ball Foundation could take over those securities, but merely gave Ball Foundation the right to sell them. Any purchaser at such sale who took with knowledge of the infirmity would be subject to it. Certainly Ball Foundation

as a purchaser would not be an innocent party. The only provision contained in the Bradley-Murphy note to Ball Foundation material to this question is as follows:

“At any time after the principal of this note shall have become due and payable, whether by reason of maturity, declaration, or otherwise, the same not having been fully paid, Foundation may sell, assign and deliver the Collateral Securities, but not less than all of the Collateral Securities, pursuant to a public sale thereof, provided that Foundation shall have given at least ten days' written notice of the time and place of such public sale to the undersigned. At such sale either the undersigned or Foundation may bid for and purchase the whole or any part of the Collateral Securities and Foundation or any other purchaser shall hold the Collateral Securities so purchased free from any rights of redemption on the part of the undersigned, which rights are hereby expressly waived and released. In case of any such sale, after deducting all costs and expenses of every kind, Foundation shall apply the residue of the proceeds of such sale to the payment in full of the principal and interest remaining due on this note, retaining the overplus, if any, without any obligation to pay or account to the undersigned for such overplus or any part thereof; but the undersigned shall not be liable to Foundation for any deficiency after application as aforesaid of the proceeds of such sale, the intent hereof being to confine Foundation's rights against the undersigned under this note to the right to liquidate the indebtedness evidenced by this note solely through the sale of the Collateral Securities and the application of the net proceeds of such sale to the indebtedness evidenced by this note, retaining the overplus, if any, whereupon the undersigned shall have no further liability under this note.”

In view of all of the foregoing, it is submitted that the present plan of reorganization providing for the issuance of \$600,000 in notes and over 13,000 shares of common stock to the Junior Indebtedness is unfair and that independent counsel having no relationship to creditors of Higbee should be appointed for the formulation of a plan that is fair.

EXCEPTION 4.

In connection with this exception, we beg to refer to the arguments set forth *supra* under the headings of Exceptions 1, 2 and 3.

EXCEPTION 5.

It is quite apparent that the Special Master was not familiar with all of the terms of the purchase agreement between Ball Foundation and Messrs. Bradley and Murphy or else he would not have used the argument set forth in his report (p. 12) in which he says that there is no reason to suppose that the Ball Foundation will not at this time cancel the purchase agreement with Bradley and Murphy and prove the Junior Indebtedness for its full amount of approximately \$1,913,000.00 as of September 30th, 1940. Besides the argument against this contention set forth *supra*, we beg to call the court's attention to the fact that the capital advance defense as laid down in *Taylor et al. vs. Standard Gas & Electric Co., supra*, could be asserted against the Junior Indebtedness in the hands of the Ball Foundation as effectively as in the hands of Bradley and Murphy. It is certainly obvious that the Special Master is in no position to argue that the Junior Indebtedness, without any question, could be proven for its face amount plus interest, in the hands of the Ball Foundation. Again, George Ball an officer of Ball Foundation, was an officer of Midamerica and as such knew of the fraud perpetrated against all concerned in the now famous Morgan Sale on September 30, 1935, wherein Midamerica purchased the Junior Indebtedness for \$100,000. The opinion of the Court in the Van Sweringen Company case filed September 21, 1939, and in the Van Sweringen Corporation case filed January 22, 1940, clearly sets a precedent that claims which were bought by Midamerica filed in proceedings such as these, are to be allowed only in the amount paid for such claims by Midamerica. With the two above mentioned defenses available, we respectfully urge that no consideration should be given by this court to the contention and argument of the Special Master that the Preferred Stockholders should accept this Plan or run the grave risk of having the Junior Indebtedness proven in its entirety ahead of the First and Second Preferred Stock.

EXCEPTION 6.

This Amended Plan of Reorganization of Higbee provides for the issuance to the owners of the Junior Indebtedness 13,517 shares of common stock, and to the First and Second Preferred Stockholders 12,757 shares of common stock. It further provides that the common stock is to have the right to elect, after the Senior Debt has been paid, four of the seven directors forever thereafter. This means that Bradley and Murphy, or any other person or persons holding this block of stock can continue to control Higbee as long as they choose regardless of whether they ever declare and pay a dividend on the New Preferred Stock. This means that after the Senior Debt has been paid, Bradley and Murphy, or anybody else holding this block of stock could pay themselves salaries in any amount so long as same could not be proven in court to be a fraud on the company. It is quite conceivable that such salaries could prevent forever a dividend payment on the New Preferred Stock. At the end of five years, \$350,000 will be due the New Preferred Stockholders in dividends; at the end of ten years this amount will have reached \$700,000. Even with Higbee showing a fair profit each year after the Senior Debt is paid off, is it likely that the holders of the above block of stock would provide for the payment of the cumulated dividends or is it likely that they would raid the treasury of Higbee by the payment of enormous salaries, on the theory that a "bird in the hand is worth two in the bush."

The Preferred Stockholders of Higbee are now entitled to elect all of the Directors. Certainly any Plan which does not provide for the New Preferred Stockholders to elect at least a majority of the directors during the time there are any arrearages in the payment of dividends, is unfair to said stockholders.

The argument that the Preferred Stockholders are better off with the right to elect three directors out of seven, at all times, then the right to elect all of the directors when dividends are not paid, is not sound. Anybody who has had any experience on directorates where a dominated block of directors is in control, well knows that he might as well be on the "side lines" or sitting in Jerico when on every proposition submitted to the directorate, it is a fore-

gone conclusion that said proposition will be approved or disapproved according to the wishes of the controlled block.

We respectfully urge that this Plan be found unfair to the Preferred Stockholders in this respect.

EXCEPTION 7.

We submit that any Plan of Reorganization of Higbee which provides for the issuance of ten year notes in the amount of \$600,000 and a block of common stock of Higbee in the amount of 13,517 shares to the holders of the Junior Indebtedness, when that block of common stock carries with it absolute control of Higbee, is grossly unfair to the holders of First and Second Preferred Stock. See argument *supra*.

EXCEPTION 8.

Higbee has always conducted all of its business in Cleveland, Ohio, and no doubt will continue to conduct all of its business in Ohio. The laws of Ohio provide for cumulative voting for all stock which has voting rights. The only objection we have to Higbee continuing as a Delaware corporation is that though Higbee does all of its business in Ohio, the stockholders are deprived of the right to cumulative voting. The Special Master argues in his Report (p. 13) that the stockholders, when purchasing their stock, knew that the corporation was a Delaware Corporation and that the rights of all parties were governed by Delaware laws. We desire to call the Court's attention to the Prospectus issued by The Union Trust Company in March, 1923, when the present 7% Cumulative First Preferred Stock of Higbee was sold. There was absolutely nothing in that Prospectus to indicate that Higbee was a Delaware corporation or to infer that Higbee was not an Ohio corporation. A photostatic copy of this Prospectus was filed in these proceedings by attorneys for Securities & Exchange Commission. The Special Master argues that to reincorporate as an Ohio corporation, would be not only a lengthy but expensive procedure and would unduly delay and hamper these Reorganization Proceedings. In answering this argument, we beg to state that it will be entirely satisfactory to us to have a provision incorporated

under this Plan in the Regulations of Higbee to provide for cumulative voting. The laws of Delaware permit cumulative voting where the proper provisions for same are incorporated in the Charter and/or By-Laws and Regulations of a corporation.

EXCEPTION 9.

Inasmuch as the Preferred Stockholders now have the right to elect all of the directors of Higbee, we feel that any Plan which deprives said stockholders of that right is not fair and equitable. However, it is not our intention to object to that part of the Plan which provides for the holders of the Senior Rent Debt to elect one director until such time as that indebtedness has been paid off.

EXCEPTION 10.

We believe that the now proposed Plan does not conform with the requirements of Section 216 of the Chandler Act because the provisions contained in said Plan with respect to control of the reorganized company and the voting rights of the two classes of stock are not in accordance with Public Policy. See discussion of this matter elsewhere in this Brief.

EXCEPTION 11.

As argued above, we desire to emphatically urge that any Plan which does not provide that until all of the notes issued under the Plan, together with all of the accumulated and current dividends on the New Preferred Stock have been paid, Higbee should not in any one fiscal year pay an aggregate amount for executive salaries in excess of \$75,000 (said executives shall be deemed to include the President, Vice Presidents, Secretary and Treasurer), would not be fair and equitable to the Preferred Stockholders. See argument in connection with Exception 6, *supra*.

EXCEPTION 12.

This Amended Plan for Higbee provides (p. 7) as follows:

"Said new notes and said new Common Stock (together with all interest and dividend payments and other distributions made with respect thereto) shall

be issued to and held by such bank or trust company in the City of Cleveland, Ohio, as may be designated by the Court, in escrow, pending the determination by litigation or otherwise of the ownership thereof as among Charles L. Bradley, John P. Murphy, the George and Frances Ball Foundation, Warren L. Morris, Assignee of The Vaness Company, and the Building Company. The fees of said escrow agent shall be paid by Higbee. The right to vote or consent in respect of said notes and Common Stock while the same shall be so held in escrow shall be vested in Charles L. Bradley, John P. Murphy and the George and Frances Ball Foundation pursuant to and in accordance with their contractual agreements of June 4, 1937."

We strongly urge that any Plan which does not disclose definitely who will eventually own the notes and especially the common stock to be issued for the Junior Debt, when said common stock carries with it absolute and permanent control of the debtor, is not fair and equitable to the Preferred Stockholders of Higbee. We are strongly of the opinion that the Preferred Stockholders, and especially this Court, should know definitely into whose hands all the notes are going and certainly into whose hands 13,517 shares of common stock are going when those shares carry with them absolute control and management of Higbee forever. Counsel for debtor has testified in these proceedings to the effect that he had grave doubt as to whether or not the Junior Debt could be proven in the hands of Bradley and Murphy for more than they agreed or paid for it. According to the Plan, Bradley and Murphy have, or will receive \$69,673.71 as their share of the Senior Debt. This means that Bradley and Murphy actually paid only \$530,326.29 for the Junior Debt. For the Junior Debt \$600,000.00 in notes are being issued together with 13,517 shares of common stock, with a reputed book value of over \$1,000,000. Action on this Amended Plan of Higbee should be delayed by this Court until all of the claimants of the Junior Indebtedness have settled their disputes of ownership, in order that this Court may be informed as to who are to be the owners of the notes and especially the common stock to be issued for the Junior Debt.

The Special Master, in his Report (p. 16), says that no party has raised any objection to either the Board of Directors or the Officers as set forth in the Plan. Why should anybody object to the Board of Directors and Officers of Higbee as enumerated in the Plan when such directors and officers of Higbee as enumerated in the Plan will for a certainty continue only until the next stockholder's meeting. It is quite definite that Attorney Fullmer or his successor, will represent the Senior Rent Indebtedness on the Board of Directors, but who can say who the other directors will be and especially when according to the present Plan, nobody knows who will own the 13,517 shares of common stock which will have the right to elect three directors until the Senior Debt is paid.

With this escrow provision in the Plan, it is impossible to assert the argument that Bradley acted in bad faith when as a director of Higbee he took part in the purchase of the Junior Indebtedness for himself and Murphy, when he should have made said purchase for Higbee, because those in favor of this Plan can argue that it is possible that when the claimants of the Junior Debt have finished their negotiations, Bradley and Murphy will have no part of the securities of Higbee issued for same. All of this makes an impossible situation and we urge again that this Court declare that this Plan containing this escrow provision is not fair and equitable to the Preferred Stockholders.

GENERAL.

The Special Master argues in his Report (p. 9) that the only Objectors to the Plan are three stockholders owning a total of 275 shares of a total of 16,400 shares of the Preferred Stock of the Debtor and that said Objectors represent approximately 1.6% of the Preferred Stock of the Debtor. We beg to call the Court's attention to the fact that the owner of one share of stock may present objections to any Plan as to whether or not it is feasible, fair or equitable. The Special Master further argued in his report that none of these parties introduced any evidence whatsoever, supporting the objections, when he well knew that two of the Objectors were members of the New Preferred Stockholders Committee of Higbee and the attorneys for said Committee had taken hours of testimony and intro-

duced many Exhibits which had to do with the very objections filed by these two former members of said committee.

We wonder if the Special Master would have had these Objectors reintroduce this same testimony amounting to many hundreds of pages at the added expense of the Debtor, or does he feel that such testimony cannot be used to support the contentions of these Objectors.

CONCLUSION.

WHEREFORE, Objectors respectfully urge that the Report of the Special Master be disapproved and rejected for the following reasons:

1. The so-called Junior Indebtedness should be held to be a capital advance and therefore subordinated to the Preferred Stock.

2. In the alternative, the so-called Junior Indebtedness should be allowed for no more than \$100,000 that being the amount Midamerica paid for same.

3. In the second alternative, the so-called Junior Indebtedness should be allowed for no more than \$600,000 (less any sum or sums received or to be received with respect to the participation in the amount of \$69,673.71 in the so-called Senior Debt), that being the amount Messrs. Bradley and Murphy agreed to pay for same.

4. That the Plan be held to be unfair insofar as it provides for the issuance of 13,517 shares of common stock to the Junior Indebtedness and the allocation of voting control to said common shares, and for the other reasons advanced in this Brief in connection with all the Exceptions filed herein.

Objectors respectfully request the opportunity to argue the objections orally.

Respectfully submitted,

J. F. POTTS AND JOHN H. McNEAL,

Attorneys for Objectors.

February 13th, 1941.

Copies of the within Brief were this day mailed to the following attorneys of record in these proceedings:

Jones, Day, Cockley & Reavis, Attys. for Debtor,
1759 Union Commerce Bldg.

Bushnell, Burgess & Fulton and R. F. Fullmer, Attys. for
Cleveland Trust Company, Trustee for the Metropolitan
Life Insurance Company,
1250 Terminal Tower Bldg.

Sawyer, Cummings, Mook & Douglas, Main Office E. 9th &
Euclid Ave. and Baker, Hostetler and Patterson, Attys.
for Cleveland Trust Co.,
Union Commerce Bldg.

Davis, Polk, Wardwell, Gardiner & Reed, New York City,
and Baker, Hostetler & Patterson, Attorneys for J. P.
Morgan & Co.,
Union Commerce Bldg.

Baker, Hostetler & Patterson, Attys. for The Cleveland
Trust Co., Assignee of Midland Bank,
Union Commerce Bldg.

Oliver Stamper, Attorney for Union Bank of Commerce,
Union Commerce Bldg.

Chas. F. Carr and Addison H. Brennan, Attorneys for Rodney
P. Lien, Superintendent of Banks, liquidating The
Guardian Trust Company,
Guardian Bldg.

Edmund Burke, Jr. and Wm. R. Sherwood, Attys. for Securities
& Exchange Commission,
1370 Ontario St.

Fackler & Dye, Attys. for Charles L. Bradley and John P.
Murphy,
308 Euclid Ave.

Glen O. Smith, Atty. for Warren L. Morris, Assignee of
The Vaness Company,
Union Commerce Bldg.

Harvey O. Mierke, Chairman of Committee of Preferred
Stockholders,
Union Commerce Bldg.

- M. B. & H. H. Johnson, Attys. for Preferred Stockholders Committee,
Union Commerce Bldg.
- Bloomfield & Orr, Attys. for New Committee of Stockholders,
Guardian Bldg.
- I. Walter Sharp, and Hauxhurst, Inglis, Sharp & Cull, Attys. for Cleveland Terminals Building Company,
Bulkley Bldg.
- Everett Warner,
403 Western Reserve Bldg., Muncie, Ind., and
Charles S. Wachner, Attys. for George and Frances Ball Foundation,
1734 Union Commerce Bldg.
- John H. McNeal and J. F. Potts, Attys. for J. F. Potts and Wm. Boag, Preferred Stockholders,
502 Auditorium Bldg.
- Ewing & Hecker, Attys. for Estate of Charles M. Kenney, Preferred Stockholder,
Guardian Bldg.
- Squire, Sanders & Dempsey, Attys. for Cleveland Railway Co.
Union Commerce Bldg.
- R. W. Purcell, Atty. for Terminal and Shaker Heights Realty Company,
Terminal Tower Bldg.

YOUNG EXHIBIT 9.

Reply Brief of Potts and Boag (Preferred Stockholders) in Answer to Debtor Brief re Exceptions to Plan of Reorganization.

(Case No. 36,119, U. S. D. C., N. D. O.—caption omitted.)

To the Honorable Paul Jones, Robert N. Wilkin and Frank L. Kloebe, Judges:

In answer to our brief in support of exceptions to the Master's report recommending approval of the Amended Plan of Reorganization the debtor has filed a brief which requires the following comments:

FIRST, except for a brief discussion of one of our objections, namely: that the so-called Junior Indebtedness should be treated as a capital contribution, proponents of the Plan have failed to discuss the issues involved here nor do they deny the facts set forth in our original brief nor the argument or discussions of law therein contained. Even in the brief discussion of the capital contribution issue, there are no authorities cited by the debtor nor is there any reference to the record in support of the factual statements therein contained. The best arguments which debtor's counsel seem to have been able to assert consists of mere denial.

SECOND, it has been stated that objectors own and therefore represent only 260 shares of Higbee First Preferred. While we believe that the owner of a single share has as much right to be heard as the owner of many shares, we wish to point out to the court that objectors were originally members of the New Preferred Stockholders' Committee; that objectors resigned from said committee in protest over the unauthorized action of its counsel in approving this Plan. The representation which said New Preferred Stockholders' Committee now claims was acquired mainly through the presence on such Committee of Messrs. Potts and Boag, the present objectors, and it is now a fact that a very large proportion of the stockholders which the New Preferred Stockholders' Committee claims to represent actually look to these objectors for the protection of their interest. The two remaining members of that committee are the owners of 10 shares of Preferred Stock each.

THIRD, debtor alleges that these objectors did not introduce any evidence in support of their objections. This is a strange allegation coming from debtor. The evidence was introduced on behalf of the New Preferred Stockholders' Committee when objectors were members. Can it be that debtor's counsel would deny them the privilege of using each and every bit of evidence introduced in this record from the commencement of the proceedings? Certainly all of the record is available to all parties in a bankruptcy proceeding.

FOURTH, counsel for debtor persists in its assertion that there is "grave danger" that Ball Foundation will be able to assert the Junior Indebtedness in its full amount. No

discussion of this is contained in its brief and for good reason; as our argument is uncontrovertible. Even the brief of Ball Foundation filed in reply to our original brief admits that Ball Foundation would have to "purchase" the Junior Indebtedness upon a sale of the collateral under the Bradley-Murphy note. Certainly Ball Foundation as purchaser could get no better title than the sellers have.

FIFTH, counsel for debtor attempts to justify the inequities of the present plan by referring to "inevitable delay" if litigation is necessary. May we respectfully point out that the objections to the Junior Indebtedness were filed in May of 1938 and that litigation of the issues here presented could have been finally completed before this time, had it not been for the reluctance on the part of debtor's counsel to bring the matter to an issue. Could it be that this reluctance was caused by a consideration of the interest of Mr. Abbott's other admitted client, Ball Foundation?

SIXTH, we submit that the arguments contained in our original brief are all valid and the objections should be sustained.

Respectfully submitted,

J. F. POTTS and

JOHN H. MCNEAL,

Attorneys for Objectors,

502 Auditorium Bldg.—MAY 1926.

YOUNG EXHIBIT 10.

Objections and Exceptions of Potts and Boag (Preferred Stockholders) to Ad Interim Report of Special Master Recommending Denial of Application for Appointment of Special Counsel (February 17, 1941).

(Case No. 36,119, U. S. D. C., N. D. O.—caption omitted.)

*To the Honorable Paul Jones and Robert N. Wilkin,
Judges of the District Court of the United States
for the Northern District of Ohio, Eastern Division:*

Now come J. F. Potts and William W. Boag, holders of 250 shares and 10 shares respectively of the First Preferred Stock of the debtor, and respectfully object and except to the ad interim Report of the Honorable William B. Woods, Special Master, recommending denial of the application for the appointment of Special Counsel on the grounds and for the reasons that the Special Master erred as hereinafter set forth:

EXCEPTION 1.

The Special Master erred in denying the application for the appointment of Special Counsel for debtor.

EXCEPTION 2.

The Special Master erred in failing to appoint Special Counsel for debtor.

EXCEPTION 3.

The Special Master erred in failing to find that present counsel for debtor, Messrs. Jones, Day, Cockley & Reavis, presently occupy and for the entire duration of these Reorganization Proceedings, have occupied positions which conflict with their duties and obligations to the debtor as its counsel herein; that because of these conflicting positions, it is impossible and has been impossible for said counsel to render impartial service to the debtor in the performance of the necessary duties which should have been and must be performed in connection herewith.

EXCEPTION 4.

The Special Master erred in failing to find that the representation by debtor's present counsel of Midamerica Corporation, from October 1, 1935, to April 1937, constituted conflicting representation by said counsel.

EXCEPTION 5.

The Special Master erred in failing to find that the representation by debtor's counsel of George and Frances Ball Foundation from April 1937 to the present date constitutes conflicting representation by said counsel.

EXCEPTION 6.

The Special Master erred in holding that counsel for debtor at no time represented Ball Foundation in any proceedings involving this debtor or in any claim against this debtor.

WHEREFORE, it is respectfully requested that the ad interim Report of the Special Master be rejected and that the application for the appointment of Special Counsel for debtor be granted.

Respectfully submitted,

J. F. POTTS and

JOHN H. MCNEAL,

Attorneys for Objectors,

502 Auditorium Building,
MAin 1926.

YOUNG EXHIBIT 11.

Brief in Support of Objections and Exceptions of Potts and Boag (Preferred Stockholders) to Ad Interim Report of Special Master Recommending Denial of Application for Appointment of Special Counsel.

(Case No. 36,119, U. S. D. C., N. D. O.—caption omitted.)

*To the Honorable Paul Jones and Robert N. Wilkin,
Judges of the District Court of the United States
for the Northern District of Ohio, Eastern Division:*

For the convenience of the Court and for the sake of brevity, we will hereinafter refer to

Jones, Day, Cockley & Reavis or its predecessors,
Tolles, Hogsett & Ginn, as "Jones, Day, Cockley
& Reavis," or "Counsel for Debtor,"

The Higbee Company as "Higbee" or "Debtor,"

The Vaness Company as "Vaness,"

The Cleveland Terminal Building Company as "CTB,"
The Midamerica Corporation as "Midamerica,"
George and Frances Ball Foundation as "Ball
Foundation,"

O. P. and M. J. Van Sweringen and Associates as the
"Van Sweringens."

In connection with our Application for the Appointment of Special Counsel for debtor, testimony was taken before the Special Master on January 9th, 1941, and that testimony substantiated all of the pertinent allegations of our Application and together with previous testimony taken in these proceedings, developed the following facts:

1. That the law firm of Jones, Day, Cockley & Reavis has represented Higbee continuously since 1928.

2. That the law firm of Jones, Day, Cockley & Reavis on or about September 30th, 1935, organized Midamerica and represented that company as legal counsel thereafter until May 4th, 1937, though Midamerica had purchased the so-called Junior Debt together with a \$69,673.71 participation in the Senior Debt and all of the common stock of Higbee, at the so-called Morgan Auction Sale on September 30th, 1935. During the existence of Midamerica, Charles L. Bradley and John P. Murphy served as officers of that company.

3. That the law firm of Jones, Day, Cockley & Reavis, has represented the Ball Foundation as legal counsel, continuously since said Ball Foundation acquired the Van Sweringen securities from Midamerica on or about May 4th, 1937. The said Van Sweringen securities included the Junior Debt and other above-mentioned securities of Higbee.

4. That the law firm of Jones, Day, Cockley & Reavis, on or about June 4, 1937, acting for its client the Ball Foundation, negotiated the sale of the Junior Debt and all of the common stock of Higbee together with a \$69,673.71 participation in the so-called Senior Debt of Higbee, to Charles L. Bradley and John P. Murphy for which the latter agreed to pay a total of \$600,000 with a down payment of \$60,000, the balance represented by notes. To secure said notes, the Ball Foundation retained the subject matter of the sale.

5. That the law firm of Jones, Day, Cockley & Reavis, acting for its client the Ball Foundation, even before the Amended Plan of Reorganization of Higbee was filed on September 27th, 1940, negotiated with counsel for Warren L. Morris, Assignee for the benefit of creditors of Vaness, who had filed a lawsuit in the state of Indiana, against Ball Foundation (in which lawsuit, counsel for debtor appear as attorney of record for Ball Foundation), in an effort to settle this lawsuit by turning over a certain amount of the 10-Year Notes which were to be issued by Higbee in connection with the Junior Debt claim. The Amended Plan filed for Higbee on September 27, 1940, called for \$100,000 of the 10-Year notes to be issued to Vaness and CTB.

6. That the law firm of Jones, Day, Cockley & Reavis, acting for its client the Ball Foundation, also before the Amended Plan of Reorganization of Higbee was filed on September 27th, 1940, and thereafter negotiated with counsel for CTB which had made certain claims against the Ball Foundation and had threatened to file lawsuits in connection therewith, in an effort to settle said claims by allotting to CTB certain other amounts of the 10-Year Junior Indebtedness notes to be issued by Higbee and which were to be given to the Ball Foundation on its claim to said Junior Debt.

In spite of the above facts, the Special Master found that no conflict of interest appears with respect to the representation of the debtor by Messrs. Jones, Day, Cockley & Reavis.

Part of the testimony given by Thomas H. Jones of the law firm of Jones, Day, Cockley & Reavis, at the hearing on January 9th, 1941, reads as follows:

"Q. Now, in matters since the Ball Foundation filed its claim against Higbee in these reorganization proceedings in the name of Mr. Wachner, have you represented the Ball Foundation in any negotiations whatsoever involving the disposition of the Higbee notes?"

A. Well, are you referring to the sale of the Higbee notes to Murphy and Bradley?

* Q. No. I mean the proposed new notes to be issued by The Higbee Company in this new plan of reorganization.

A. Yes. I have discussed with representatives of the Vaness Company and CTB the allocation of whatever notes should be issued under the plan in respect to the junior debt.

Q. Have you discussed those plans in conjunction with or with the knowledge of Mr. Abbott who is representing The Higbee Company?

A. You mean the allocation of the notes?

Q. Yes; and the number of notes to be issued and to whom they are to be issued?

A. No; I have never discussed that. As a matter of fact, I have never to this day read the Higbee plan. I know very little about it. The discussions that I have had have been on the basis of the provision in the plan for the issuance of \$600,000 of Junior notes.

Q. But, as a legal representative, legal counsel, for Ball Foundation, you are interested in the number of notes which The Higbee Company proposes, or the amount of notes The Higbee Company proposes to issue for the junior debt, is that right?

A. Well, I certainly am not legally interested, because I don't represent that claim. What my personal feelings may be isn't the thing you are after, I presume.

Q. No; but, Mr. Jones, you are representing the Ball Foundation in an effort to get rid of a lawsuit in Indiana brought by the trustee of Vaness.

A. That is right.

Q. And a lawsuit brought by CTB, or a claim made by CTB and you are interested in the Ball Foundation to the extent that they are interested in the junior debt, inasmuch as Messrs. Bradley and Murphy have not paid the purchase price, aren't you?

A. Yes."

We contend that there have been continuous conflicting interests represented by Messrs. Jones, Day, Cockley & Reavis since September 30, 1935, when they organized Midamerica and began their legal representation of that company. During the time Messrs. Jones, Day, Cockley & Reavis represented Midamerica, they, by their very employment, were interested and bound to protect their client with respect to its holdings which involved the Junior Debt

and other securities of Higbee. Those facts constituted a conflict of interest.

When Messrs. Jones, Day, Cockley & Reavis were employed as legal counsel for Ball Foundation, they became duty bound to protect their client in respect to its claims which could be asserted against Higbee. These facts constituted a conflict of interest.

When Messrs. Jones, Day, Cockley & Reavis, on behalf of their client the Ball Foundation, negotiated the sale of the Junior Debt and the other securities above mentioned, to Messrs. Bradley and Murphy for \$600,000, they created a 3-way conflict of interest. Having negotiated the sale of said securities to Bradley and Murphy, they owed said Bradley and Murphy at least a moral obligation to help them realize as much as possible over and above the purchase price on said securities out of Higbee. By continuing to represent the Ball Foundation, Messrs. Jones, Day, Cockley & Reavis were duty bound to help Messrs. Bradley and Murphy to get at least enough out of Higbee in connection with said securities to pay the purchase price to their client the Ball Foundation. This impossible conflict of interest is reflected in the Amended Plan of Reorganization for Higbee drafted and filed by Messrs. Jones, Day, Cockley & Reavis, on April 14th, 1938, wherein it was proposed to recognize the Junior Debt in its full face amount though the said Jones, Day, Cockley & Reavis well knew its infirmities and the defenses which could have been lodged against it, and though Mr. Abbott, of Counsel for debtor, had grave doubt that said Junior Debt and the other securities bought with it, could be asserted in a Reorganization of Higbee in the hands of Messrs. Bradley and Murphy for an amount more than \$600,000. Those facts constituted a conflict of interest.

After Messrs. Bradley and Murphy had defaulted in their payments on their contract of purchase with Ball Foundation, Messrs. Jones, Day, Cockley & Reavis, acting on behalf of their client Ball Foundation, secured the services of Attorney Charles S. Wachner of Cleveland, Ohio, to file a claim for the Ball Foundation in the Higbee Proceedings and to appear as attorney of Record. This was done on or about October 11th, 1938. However, Messrs. Jones, Day, Cockley & Reavis continued to represent their

client the Ball Foundation in a lawsuit in Indiana filed by Vaness, and in other matters in Ohio and by such legal representation, they were naturally interested in the outcome of their client's claim against Higbee, though said claim was lodged in the name of Charles S. Wachner and Everett Warner as attorneys. These facts constituted a conflict of interest.

To say that Messrs. Jones, Day, Cockley & Reavis were not representing conflicting interests when they sat down at the conference table with the attorneys for Vaness and CTB before the Amended Plan of Higbee was filed on September 27th, 1940, and began to "dish out" the proposed 10-Year notes of Higbee to be issued for the Junior Debt, to settle lawsuits, threatened lawsuits and claims against their client the Ball Foundation, while at the same time representing Higbee, is to say that day no longer follows night.

After the Amended Plan of Higbee was filed on September 27th, 1940, and after Objections had been filed to the Plan by numerous parties, Messrs. Jones, Day, Cockley & Reavis not only failed to join in with those objecting and raising defenses to the treatment of the Junior Debt, but continued to have conferences with the attorneys for Vaness and CTB relative to the allocation of the proposed \$600,000 of 10-Year notes of Higbee in order to settle lawsuits and claims filed against their client the Ball Foundation. These representations constituted a conflict of interests.

At the hearing on this Application held January 9th, 1941, Mr. Abbott, of Counsel for Higbee, testified as follows:

"Q. Now, will you answer the question, Mr. Abbott? I want to know whether at the time you filed the amended plan of reorganization, dated April 14, 1938, you thought that the junior debt in the hands of Messrs. Bradley and Murphy was entitled to a dollar-for-dollar consideration in the reorganization; that is, subordinated to the senior debt?

A. I would be very glad to go back and refresh my recollection as to any memoranda of law which we had in respect to that at that time. Whether I had reached a final conclusion as to it or not, I do not know. To

the best of my recollection, I thought there was a very decided question presented by the preferred stockholders in that Mr. Bradley, being one director out of seven, at the time he acquired this for \$600,000, whether the debt could be proved by him for more than \$600,000. As far as I could I looked up the law on that point. So there was a very grave doubt as to whether Mr. Bradley was entitled to prove for more than \$600,000."

Though Mr. Abbott of counsel for Higbee had a very grave doubt as to whether Messrs. Bradley and Murphy were entitled to prove their claim for more than \$600,000, he has never filed one paper in these Proceedings contesting the claims asserted by Messrs. Bradley and Murphy, but on the contrary he has, on numerous occasions, resisted the efforts of those who attempted to contest these claims. Furthermore, despite the "very grave doubt," Mr. Abbott filed the Amended Plan dated April 14th, 1938, calling for the issuance of new Higbee notes on a dollar-for-dollar basis for the old Junior Debt.

Mr. Abbott of counsel for Higbee, though he had the above "grave doubt," is now urging the approval of a Plan which recognizes the securities fraudulently bought by Messrs. Bradley and Murphy from Ball Foundation, to the extent of \$69,673.71, already paid in cash or to be paid in three year notes, \$600,000 in 10-Year notes and 13,517 shares of New Common Stock of Higbee, having a reputed book value of over \$1,000,000 and control of Higbee.

Mr. Abbott's justification for this is that due to defaults in the Bradley-Murphy note to Ball Foundation, Ball Foundation could foreclose upon or take back the collateral for said note consisting of the Junior Debt and other securities; and prove them for their full amount. (See record of January 9, 1941, page 23.) In making this statement, Mr. Abbott was either in total ignorance of the facts, or deliberately attempting to mislead the Court. The only right of recourse given Ball Foundation under the Bradley and Murphy note is to sell the collateral at public sale. Any purchaser at such sale would be subject to any defenses which Higbee has against Bradley and Murphy. This would clearly be true if Ball Foundation were the pur-

chaser. (See discussion of this matter at pages 10-11 of our brief in support of exceptions to Master's Report on Plan.) (Rec. pp. 136-138).

Mr. Abbott's failure to contest the claims, asserted by Messrs. Bradley and Murphy, may have been due in part to the fact that Mr. Bradley has been a director of Higbee since 1933, and the fact that Mr. Murphy has been a director of Higbee since 1937, and the added fact that Mr. Bradley has been President of Higbee since 1937, and as such Chief Executive, has no doubt, had the power to retain or remove legal representation.

This Plan of Reorganization was drafted by Mr. Abbott of counsel for Higbee, though he well knew * * * (1) the "*defense of capital advance*," as decided in the case of *Taylor vs. Standard Gas & Electric Company*, 306 U. S. 307, could have in good faith been asserted against the Junior Debt * * * (2) *together with the defense* that the Junior Debt should never be allowed *in the hands of anyone* for more than Midamerica paid for it as was decided by this Court in the matter of Van Sweringen Corporation, Debtor, and The Cleveland Terminal Building Company, Subsidiary Debtor, a Reorganization matter wherein claims were presented very similar to the Junior Debt in the instant case, and (3) that the defense to the allowance of the claim in the hands of Bradley and Murphy for more than \$600,000 was available.

The Special Master, in his Report (p. 2) on this Application, argues that

"The applicants do not claim that the facts on which they now reply were not well known to them and the other creditors and stockholders for the past several years * * *."

True, we made no claim in our Application of Brief as to what was and what was not well known to us for the past several years, but we desire to make the claim now that we had no knowledge of the fact that Messrs. Jones, Day, Cockley & Reavis represented the above recited conflicting interests, until testimony was taken before the Special Master on Thursday, January 9th, 1941. It is most ridiculous for the Special Master to argue by inference that we have had knowledge of all of these matters for the past several years when most of the acts complained of have happened within the last six months or a year.

The Special Master, in his Report (p. 2), argues that no other parties to the Proceedings have joined in the Application for Appointment of Special Counsel. We respectfully call the Court's attention to the statement made by Mr. Sherwood, representing the Securities & Exchange Commission at the Hearing on this Application held January 9th, 1941, which reads as follows:

"Mr. Sherwood: At the time that the Securities & Exchange Commission, with the permission of the Court, intervened in this proceeding, which was in the early part of last year, we gave very serious consideration to making a motion for the appointment of an Examiner for the purpose of formulating a plan of reorganization and conducting whatever investigation might be advisable. We ultimately decided not to make that motion primarily for two reasons. The first was that we came into the proceedings after it had been pending for about four and a half years, and we felt that an appointment of an Examiner, if one were appointed, would tend to disrupt the proceedings and prolong them.

The second reason was that after a number of conferences with Mr. Abbott we came to the conclusion that he was doing exactly what he said he was doing; that is, representing The Higbee Company; neither the creditors nor common stockholders nor preferred stockholders, nor any class that was interested in the company, but solely the interests of the company as a going concern. We didn't know at that time that another partner in Mr. Abbott's firm represented the Ball Foundation, though I have no doubt that if we had inquired we would have found it out.

We are not disposed to urge that special counsel be appointed, or that they not be appointed. We feel that there is undoubtedly merit in the contention that the junior indebtedness should be treated as a capital contribution. On the other hand, that would involve prolonged litigation, and we have felt that there is every reason to believe that a fair plan of reorganization could be worked out here without resorting to such litigation, and the delays that would necessarily be involved.

We have already stated, some time ago in a hearing before the Master, our objections to the plan in its present form. I don't know whether before the plan is presented to the Court on the question of whether it is worthy of consideration or not amendments can be worked out which will overcome the objections which we have made. In its present form, as I have said, the plan, we think, is definitely unfair to the preferred stockholders. I am not at all sure, if no amendments can be worked out, that we may not want to join in the motion for the appointment for special counsel to determine in these proceedings whether or not the junior indebtedness should be treated as a capital contribution, because it seems to be obvious that if that point is to be litigated, special counsel should be appointed, if only for the reason that Mr. Abbott has stated that he doesn't believe there is any merit to that contention.

I don't believe I have anything further to say on that."

It is quite evident that Mr. Sherwood was indeed surprised to hear by the testimony introduced on the date above stated, that counsel for debtor was also counsel for Ball Foundation for more than three years last past. It is also quite evident that these facts complained of which the Special Master argues were well known by creditors and stockholders for the past several years were not known by the Security & Exchange Commission which had made a thorough and complete study of the whole Higbee matter.

Rule 6 of Canons of Professional Ethics adopted by the American Bar Association and printed September 30th, 1937, reads in part as follows:

" * * It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.*

The obligation to represent the client with undivided fidelity and not to divulge his secrets or con-

fidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."

The firm of Jones, Day, Cockley & Reavis violated the above Canons of Professional Ethics in the following respects, to-wit:

1. When it accepted employment as legal counsel from its client the Midamerica Corporation, during the time said client owned the Junior Debt and other obligations of The Higbee Company.
2. When it accepted employment as legal counsel from its client the Ball Foundation when said client owned or had an interest in the Junior Debt or other obligations of The Higbee Company.
3. When it negotiated the sale of the Junior Debt and other obligations of The Higbee Company to Messrs. Bradley and Murphy, for its client the Ball Foundation.
4. When it continued to represent its client the Ball Foundation in numerous matters including those affecting The Higbee Reorganization after said firm had given this Court and all other persons interested, the impression that Charles S. Wachner was representing the Ball Foundation, by making him the attorney of record for the Ball Foundation in these Proceedings.
5. When it continued to represent its client the Ball Foundation in negotiations wherein notes to be issued by The Higbee Company in its Reorganization Plan were being allocated to different claimants against the Ball Foundation.

In each and every one of these matters above referred to, the firm of Jones, Day, Cockley & Reavis should have made a complete disclosure of all the facts to all parties interested, including this Court, and unless it received the consent of all parties interested and this Court, to continue as counsel for The Higbee Company, it should have withdrawn from the Proceedings as such.

Under the facts disclosed by the testimony submitted to this Court on January 9th, 1941, by no stretch of the imagination can it be said that The Higbee Company as such has had impartial, independent, and unshackled legal representation.

For additional discussion of the improper representation of debtor and conflicting interests, by Messrs. Jones, Day, Cockley & Reavis, the Court is respectfully referred to the Brief filed by these Applicants before the Special Master below.

We urge that the firm of Jones, Day, Cockley & Reavis be relieved of further legal representation of The Higbee Company, that Special Counsel be appointed immediately and that said Special Counsel be instructed to assert each and every defense which may exist against the Junior Indebtedness consistent with the existing facts to the end that a fair, equitable and feasible Plan of Reorganization may be worked out for The Higbee Company.

Objectors respectfully request the opportunity to argue the objections orally.

Respectfully submitted,

J. F. POTTS AND JOHN H. MCNEAL,

502 Auditorium Bldg., Phone MAin 1926.

Attorneys for Objectors.

YOUNG EXHIBIT 12.

Brief in Answer to Reply Brief filed by Debtor in re Ad Interim Report of Special Master Recommending Denial of Application for Appointment of Special Counsel.

(Case No. 36,119, U. S. D. C., N. D. O.—caption omitted.)

To the Honorable Paul Jones, Robert N. Wilkin, and Frank L. Kloebe, Judges:

Messrs. Jones, Day, Cockley & Reavis have filed in this Court a brief which is supposed to be a reply to our brief in support of our exceptions to the Ad Interim Report of Special Master recommending denial of our application for appointment of special counsel.

But for one exception, (which will be dealt with below), this so-called reply brief did not deny or answer a single one of the allegations set forth in our exceptions and/or brief. By filing such a brief, we take it that counsel for Debtor have by inference, admitted that our allegations are true, although they deny the facts constitute a *conflict of interest*. By such inferential admission, it seems to us that the matter is at issue.

Counsel for Debtor had this to say in the first paragraph of their brief, in referring to our brief:

"This alleged brief is so full of scurrilous, misleading and incorrect statements that its apparent purpose is to confuse and mislead the Court in respect to the facts concerning the alleged conflict of interest."

Now let's look at the record and see which brief is full of misleading and incorrect statements, and who is trying to mislead and confuse the Court. On page three of their brief counsel for Debtor, referring to their firm, made this assertion:

"* * * nor did it negotiate the sale between the Ball Foundation and Messrs. Bradley and Murphy. This statement made by Messrs. Boag and Potts is completely without foundation."

A part of the testimony given by Thomas H. Jones, head of the firm of Jones, Day, Cockley & Reavis, on January 9th, 1941, before the Special Master, reads as follows:

"Q. Was your firm counsel for Midamerica and the Ball Foundation when the Ball Foundation was organized?

A. No. The Ball Foundation was organized some time prior to 1937, and it was organized by local Muncie counsel. We never represented the Ball Foundation until after it had acquired some of the so-called Van Sweringen securities in July, I think, of '37.

Q. That was the first time that your firm represented the Ball Foundation?

A. That is right.

Q. Then your firm hadn't anything to do with the negotiations whereby Messrs. Bradley and Murphy bought the junior indebtedness of the Ball Foundation?

A. Yes. We represented the Foundation in that, but that was after July, 1937.

Q. Oh, it was. You represented the Ball Foundation in that purchase?

A. Yes.

Q. Now, since that time have you represented the Ball Foundation from time to time?

A. Continuously."

It is clear that Mr. Jones was mistaken as to the month when these transactions took place, but it is equally clear that his memory was correct when he said his firm did negotiate the sale to Messrs. Bradley and Murphy and represented the Ball Foundation in that purchase. In the face of that testimony given by Mr. Thomas H. Jones, we marvel at the brazen audacity of Mr. Abbott in stating in his brief that the allegation of Messrs. Boag and Potts to the effect that his firm negotiated the sale between the Ball Foundation and Messrs. Bradley and Murphy is completely without foundation, however, it may not be so surprising when you read the testimony given by Mr. Abbott on January 9th, 1941, before the Special Master, which reads as follows:

"Q. * * * Now, did you personally, Mr. Abbott, have any discussions with Mr. Bradley or Mr. Murphy about the purchase of the junior debt from the Ball Foundation?

A. No.

Q. Did you have anything to do with drawing the papers for that purchase?

A. No.

Q. Did any member of your firm have anything to do with that?

A. Not to my knowledge: I didn't know about it. I had no knowledge of that at all until long after it happened.

Q. You don't know whether the purchase was negotiated with a member of your firm or with Mr. Ball direct?

A. Why, I don't know as to that, Mr. Potts. I have no knowledge."

We respectfully submit that if there is anybody in this picture who has put misleading and incorrect state-

ments in a brief, and who has deliberately concealed facts for the purpose of confusing and misleading the Court, it has been Mr. Abbott. In that respect he seems to be the leading man.

Inasmuch as counsel for Debtor have failed to deny or answer our allegations which, beyond a doubt, establish a conflict of interest, we respectfully submit that the application should be granted.

Respectfully submitted,

J. F. POTTS AND JOHN H. McNEAL,
502 Auditorium Bldg., MAin 1926,
Attorneys for Objectors.

YOUNG EXHIBIT 13.

Brief in Opposition to Motion for New Trial filed by Debtor June 17, 1941.

(Case No. 36,119, U. S. D. C., N. D. O.—caption omitted.)

Now come J. F. Potts and William W. Boag, owners of 250 shares and 10 shares respectively, of the First Preferred stock of The Higbee Company, Debtor herein, and respectfully oppose the "Motion for New Trial" filed by Debtor herein for the following reasons:

(1) A "Motion for New Trial" at this time in these proceedings is entirely premature for the very obvious reason that there has been no *finding* or *final order* upon which such motion can be founded as a matter of Law.

A plan of reorganization of the debtor company was properly submitted to this Court for its approval, rejection or modification and this Court has seen fit to enter a discretionary order referring said plan back to the Special Master for the sole purpose of obtaining additional information. Certainly this Court is *entitled* to have this information, and its discretionary order in connection therewith does not create a legal status subject to a motion for new trial.

(2) In its memorandum of May 27th, 1941, this Court referred to the decision of the Circuit Court of Appeals in the matter of the Van Sweringen cases (decided April 16, 1941) as raising, among other questions, the question whether or not Bradley and Murphy bought the notes and stock of Higbee subject to whatever infirmity there was in Ball's title and this Court further stated that in deciding that question it might require reconsideration of the amount for which the notes may be allowed as a debt against Higbee.

All those concerned, even Counsel for Debtor, know and admit that the Junior Indebtedness was subject to compromise especially in the hands of the present claimants. Higbee² (under domination of CTB and/or Vaness) gave its notes in the total amount of \$1,551,041.61 and agreed to pay 6% interest on same. Bradley and Murphy and all other claimants have agreed to accept \$600,000.00 in notes and approximately 13,517 shares of common stock for this claim which now amounts to more than \$2,000,000.00. They have agreed to this compromise because their title to this indebtedness is reeking with infirmities and the kind of infirmities which demand the keenest scrutiny of our Courts. The mere fact that there has been a compromise on this Junior Indebtedness makes it necessary for this Court to scrutinize it from every angle and then decide whether or not said compromise is fair to all concerned under the obviously unusual circumstances.

Neither this Court nor any other Court can intelligently pass on this compromise and/or this plan without knowing who are ultimately to be the owners of these securities and the exact amounts of same.

This Court might well find that the principle of Law laid down by the Circuit Court in the Van Sweringen cases should be applied to the instant case, but due to this escrow arrangement, the Court could not apply said principle of Law inasmuch as the recipients are not named specifically as to amounts.

In line with the abundance of law established through many years wherein it has been held that directors and/or officers may not profit by buying the securities of their distressed company, this Court might well want to limit Bradley and Murphy to the exact amount they are out of

pocket. *In this connection there should be a complete disclosure as to all of the securities Bradley and Murphy bought, what amount of money they have already received on same and exactly what they are to receive in notes and stock under the proposed plan.* Under the escrow arrangement this Court could not apply this old and well established principle even though it so desired.

In their first reason (a) why this motion should be granted, Counsel for Debtor state that all of the questions suggested by the above mentioned Van Sweringen decision were carefully considered in the reorganization generally and in the compromise of the Junior Indebtedness by Counsel for Debtor, creditors, two Preferred Stockholders' Committees, the claimants to said Junior Debt, the Special Master, Securities and Exchange Commission, (all anxious to have the plan approved in its present form) and inasmuch as these questions have been given such careful consideration they conclude that the plan is fair and feasible and by inference they say this Court need not give any further consideration to such questions.

(3) Counsel for Debtor contend that the reference of the questions of ownership of securities and amounts to be issued for the Junior Indebtedness is a disapproval of the Amended Plan of Reorganization. It is obvious that such is not necessarily true so their second (b) reason for granting this motion is as weak, if not weaker, than their first (a).

(4) In connection with Debtor's third reason (c), we respectfully call this Court's attention to the following excerpt taken from the Amended Plan of Reorganization filed September 27, 1940, page 5:

"Part 3. JUNIOR INDEBTEDNESS.

** * * Said notes in respect of the Junior Indebtedness shall be issued in payment of the former notes of Higbee constituting such Junior Indebtedness and the claims thereto, as follows, to-wit:*

To George and Frances Ball Foundation, \$500,000 principal amount; To Warren L. Morris, As Assignee of The Vaness Company, and the Building Company, \$100,000 principal amount; to be divided between said Warren L. Morris, Assignee, and the Building Com-

pany in the proportion of 5/6ths to said Warren L. Morris, Assignee and 1/6th to the Building Company. The Common Stock of Higbee to be issued in respect of the Junior Indebtedness shall be issued to Charles L. Bradley and John P. Murphy, or their assignees."

These same claimants are mentioned as such in the *escrow* plan now substituted for the above provision which very definitely named the recipients of the notes and common stock to be issued for the Junior Indebtedness.

On September 27th, 1940, as set forth in the plan filed by Counsel for Debtor, everybody concerned knew just who was to be the owner of every note and every share of common stock to be issued for the Junior Indebtedness.

Now it is a deep mystery though the claimants are the same in every respect.

To again find out what was so well known on September 27th, 1940, Counsel for Debtor has the temerity to tell this Court that same would "*result in several years of protracted and expensive litigation,*

"First, before the Master in respect to a very large amount of conflicting evidence;

Second, on the Master's Report to the District Court in which all such evidence must be reviewed and additional evidence taken if offered;

Third, on appeal to the Circuit Court of Appeals, and

Fourth, on petition for writ of certiorari to the United States Supreme Court."

This "right about face" treatment of the ultimate ownership of the notes and common stock to be issued for the Junior Indebtedness seems nothing short of the fantastic.

We venture to say that this *escrow* arrangement was substituted for the very definite allocation of securities above set forth, in a deliberate attempt to conceal from this Court the information concerning the ultimate owners of said notes and common stock, thus making it impossible for this Court, or any other Court to say that any claimant or claimants by virtue of some fiduciary relationship or some other condition, could not be the recipient of these securities or at least in the amounts set forth in the plan.

In view of the fact that the owners and amounts of these notes and the common stock were definitely named in the Plan of Reorganization filed September 27th, 1940, this attempt to hide the owners by the escrow arrangement is an attempted fraud on this Court and nothing short of contempt. *If the above remarks do not constitute facts then Counsel for Debtor had another printing job done at the expense of Higbee, without authority from those named as recipients of the securities to be issued for the Junior Indebtedness.*

Warren L. Morris, Assignee of the Vaness Company, has made application to settle his claims against George and Frances Ball Foundation and others involved in the Higbee reorganization. (Counsel for Debtor might inform this Court whether or not they took part in this settlement as counsel for Ball Foundation.) It is our understanding that in case this application is approved by the Probate Court of Cuyahoga County on July 1st, 1941, Warren L. Morris, Assignee of The Vaness Company, will be removed as a claimant to the Junior Indebtedness of Higbee. In that event, the only claimants remaining to the Junior Indebtedness are Bradley and Murphy, the George and Frances Ball Foundation and Cleveland Terminal Building Company. As between Bradley and Murphy and Ball Foundation, it is our understanding that there is no dispute. CTB has no direct claim against Bradley and Murphy or Higbee but it is making a claim against the Ball Foundation involving many securities other than Higbee. Certainly this unliquidated claim of CTB against the Ball Foundation should not hold up the Higbee proceedings when as a matter of fact, the Ball Foundation is not the real party in interest in connection with the Junior Indebtedness of Higbee.

(5) In their fourth reason (d), Counsel for Debtor say that reference back to the Master may well result in increasing the Junior Indebtedness from \$600,000.00 to its face amount of \$1,551,041.61 plus accrued interest which would mean an indebtedness considerably in excess of \$2,000,000.00. Who is this mysterious party who can at any moment come out of the dark and successfully lodge this claim against Higbee for \$2,000,000.00? It certainly can't be Ball because he was covered from head to foot by

the mud and mire in the Midamerica deal and this Court has indicated that there were unquestionable infirmities in Ball's title. It certainly couldn't be Messrs. Bradley and Murphy, because their unholy situation is well known to everybody concerned as well as this Court.

If all the claimants to the Junior Indebtedness approved the treatment of said indebtedness in this plan, it should not take them very long to decide how these securities are to be divided and who are to be the ultimate owners. Then Counsel for Debtor argue

"even if the Junior Indebtedness were reduced to \$100,000, the present common stock of Higbee also involved in the question of ownership of the Junior Indebtedness, would represent a very large equity entitled to consideration in any plan of reorganization."

In the first place, the old common stock in the hands of its present owners has the same infirmity as the Junior Indebtedness, as it was purchased along with said Junior Indebtedness and a participation in the Senior Indebtedness. In the second place, if the amount to be allowed for the Junior Indebtedness is reduced to \$100,000, it will be because that amount was paid for it by Midamerica. The books of Midamerica indicate that \$200.00 was paid for the common stock of Higbee and it might well follow that \$200.00 only would be allowed for the common stock. Why counsel for Debtor would use such an argument to support a Motion for New Trial, is beyond our imagination.

(6) In their fifth reason (e), Counsel for Debtor claim that delay will cost Higbee \$7800.00 per month in interest charges. We do not agree with those figures because they represent 2% on approximately \$4,680,000. If the allowance on the Junior Indebtedness is ultimately given the proper treatment, the only added cost in interest to Higbee would be a possible 2% on the Senior Indebtedness.

Under the watchful eye of this Court, Higbee is now saving in probable salaries to officials more than the above indicated interest charges.

We suggest to Counsel for Debtor that they might well have thought of these interest charges since April 14th, 1938 to September 27th, 1940, during which time they were fighting a battle for their other client the Ball Foundation in-

stead of a battle for Higbee, in order that the allowance on the Junior Debt might never be reduced to a point where said other client might not be paid its full \$600,000.00—the price Bradley and Murphy agreed to pay the Ball Foundation.

The remarks concerning a possible \$600.00 per month in excess profit taxes due to Higbee's inability to capitalize the amount of its Junior Indebtedness in excess of \$600,000, are too silly for comment. If Counsel for Debtor would forget their other client the Ball Foundation, long enough to really resist this claim on the Junior Indebtedness, it might be that Higbee could capitalize practically all of the Junior Indebtedness.

(7) In connection with the sixth reason (f), we suggest that in the event the possible saving of money to Higbee will endanger the leases under which the Debtor now occupies its premises, it is high time that new leases be negotiated. The history of leases does not indicate that the average lessor would attempt to break a lease because the Lessee had the possible chance of saving \$500,000 and over 13,500 shares of common stock by a Court decision.

(8) In their seventh and eighth reasons (g and h), Counsel for Debtor merely argue the merits of the plan and completely lose sight that this is a so-called Motion for a New Trial on a very limited and specific matter, and entirely premature.

(9) In their ninth reason (i), Counsel for Debtor contend that they should be granted a new trial in this matter because "the Special Master has found in his report to the Court that the facts concerning the Junior Indebtedness are entirely different and distinct from the facts which govern the situation in respect to Midamerica's relationship with the Cleveland Terminal Building Company, The Vaness Company and The Van Sweringen Corporation." By such an argument they claim that the one big question before this Court in connection with these reorganization proceedings has been decided by the Special Master and, therefore, they should be granted a new trial.

(10) In their final reason, Counsel for Debtor again argue the merits of the plan rather than the merits of this so-called motion. They argue that this motion should be

granted because the only objectors are J. F. Potts, representing 250 shares of Preferred stock and William W. Boag, representing 10 shares of Preferred stock. Inasmuch as Counsel for Debtor know that so far as the approval of a Plan of Reorganization is concerned, no committee represents any stockholder other than the members of the committee itself, and inasmuch as the amount of money or number of shares represented by objectors in proceedings such as these, have no significance, it might be well if Counsel for Debtor confine their arguments to the merits of the subject matter rather than wasting this Court's time and the time of others, making statements such as above recited.

Counsel for Debtor have not produced one logical argument to support this motion. We venture to say were it not for the fact that Counsel for Debtor are more interested in their client the Ball Foundation than they are in Higbee, the information which this Court requested in its order under date of June 10th, 1941, would have been obtained in the time it will have taken for the filing and hearing of this motion. Counsel interested in Higbee only, would urge the point and the Special Master might well find that in view of all the evidence before him, it appears that Bradley and Murphy own the Junior Indebtedness and that they are the real party in interest; that all other claims are undetermined and unliquidated; and that the holders of said claims would have to look to Bradley and Murphy for satisfaction in actions separate from this.

We urge that this Motion be promptly overruled and that the Special Master be instructed to proceed immediately in such a manner as to insure that the information desired will be in the hands of this Court in the very near future.

Respectfully submitted,

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Attorneys for Preferred Stockholders.

YOUNG EXHIBIT 14.**Letter, July 10, 1941, of Independent Preferred
Stockholders' Committee.****INDEPENDENT PREFERRED STOCKHOLDERS' COMMIT-
TEE OF THE HIGBEE COMPANY.****COMMITTEE**

J. Fred Potts
William W. Boag
John W. Joughin

COUNSEL

J. Fred Potts
John H. McNeal
502 Auditorium Bldg.
Cleveland, Ohio

July 10, 1941.

To Holders of First and Second Preferred Stock
of The Higbee Company:

*Do not approve the Plan of Reorganization for The
Higbee Company.*

The undersigned constitute a Committee organized solely for the benefit of the Preferred Stockholders of The Higbee Company, and to prosecute certain objections to the Amended Plan of Reorganization dated September 27, 1940, filed for The Higbee Company. These objections were filed by Messrs. Potts and Boag, owners of 250 shares and 10 shares of First Preferred Stock, respectively. Messrs. Potts and Boag were members of the New Preferred Stockholders' Committee of The Higbee Company from June, 1938 until November 7, 1940, when they resigned due to the fact that they could not approve the above plan in certain respects and especially in respect to the treatment of the Junior Debt.

A hearing on the merits of the plan and objections thereto was had before the District Court on March 18, 1941. On May 27, 1941, Judge Jones rendered the following opinion in connection with the plan: (Read this Opinion carefully).

**IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION.**

No. 36119

In the Matter of

THE HIGBEE COMPANY,

Debtor.

In Proceedings for the Reor-
ganization of a Corporation
Filed May 27, 1941
C. B. Watkins, Clerk
U. S. District Court, N.D.O.

JONES, J.

Since the hearing of this matter upon the report and recommendation of the Master on approval of the amended plan and the exceptions thereto, the Circuit of Appeals in the matter of the Van Sweringen cases (decided April 16, 1941) has held that the notes, bonds, and securities belonging to the respective debtors in those cases were acquired and held by Midamerica as trustee for the respective Debtors. The notes in this case representing the junior indebtedness, were pledged by the Cleveland Terminals Building Company and the Vaness Company with J. P. Morgan & Company for loans made to both companies. Included with such notes was all of the common stock of The Higbee Company, which Cleveland Terminals Building Company then owned. J. P. Morgan & Company sold these notes and the common stock of The Higbee Company at the same auction sale held on September 30, 1935, to Midamerica Corporation. Thus, the question is raised whether, under the holding of the Circuit Court of Appeals in the Van Sweringen cases, either Ball or Bradley and Murphy can have any claim to the notes and stock of this debtor, as against that of cestui que trustent Cleveland Terminals Building Company and Vaness Company.

It well may be that Bradley and Murphy, who were officers and directors of the Van Sweringen enterprises, and also of Midamerica Corporation, bought the notes and stock subject to whatever infirmity there was in Ball's title and their situation. Decision of that question conceivably may require reconsideration of the amount for which the notes may be allowed as a debt against the Higbee Company, since one of the factors entering into the determination of the \$600,000.00 value given the notes was the asserted price agreed to be paid to Ball by Bradley and Murphy.

It was thought that the amended plan might be approved and voted upon by the creditors with the above questions left open or undecided until a later date, but I do not see how the Court or the creditors adequately can appraise the fairness and the feasibility of the plan until it is known for a certainty what the junior indebtedness really is to be and who is ultimately to be the owner of the notes and the new common stock.

In these circumstances, it seems essential to a proper consideration of the exceptions to the amended plan, and its approval, to have these questions heard, determined and reported by the Master. Accordingly, it will be referred to the Master for that purpose.

JONES,

United States District Judge.

An order in connection with this opinion was signed by Judge Jones on June 10th, 1941. This order was vacated on July 2, 1941.

The plan calls for the issuance of \$600,000 in notes and more than 13,500 shares of common stock for the Junior Debt. If Judge Jones should see fit to apply the same principle he applied in the Van Sweringen cases above referred to in his opinion, only \$100,000.00 would be allowed for the Junior Debt as that is the amount which Midamerica paid for said Junior Indebtedness when it bought same from J. P. Morgan & Company in 1935. This would mean a saving of \$500,000 to The Higbee Company and would eliminate more than 13,500 shares of new common stock.

If Judge Jones should see fit to apply the old principle of Law which is being followed today more than ever, that a Director and/or Officer of a company may not purchase the obligations of his distressed company and profit thereby, approximately \$530,000 would be allowed on the Junior Debt inasmuch as Messrs. Bradley and Murphy received a \$69,673.71 participation in the Senior or Bank Debt, along with the Junior Debt in their \$600,000 purchase from the Ball Foundation. This would be a saving of approximately \$70,000 to Higbee and also eliminate more than 13,500 shares of new common stock.

On July 2nd, 1941, Judge Jones decided to tentatively approve the plan without deciding on the Objections filed by Messrs. Potts and Boag, against same, and have the plan submitted to the creditors and stockholders for approval or rejection. You will have sixty (60) days from July 2nd, 1941, within which to approve or reject this plan. Give this plan some good solid thought before you act.

It has been urged upon the Court by counsel for Debtor that Messrs. Potts and Boag, representing less than two per cent (2%) of the preferred stock, are the only objectors to this plan. It has also been urged on the Court by the Special Master that the plan is fair and feasible because it has been approved by the two Stockholders' Committees, representing more than ninety per cent (90%) of the Preferred Stock. *We contend that nobody represents you regardless of what power of attorney you have sent in, on the question as to whether or not this plan is fair and feasible.*

We are of the opinion that Judge Jones is quite anxious to know whether or not there are other objectors besides Messrs. Potts and Boag. We strongly urge that you do not approve this plan in its present form. By voting "NO" on the plan you have absolutely nothing to lose and your negative vote might be instrumental in obtaining a better plan for Higbee and therefore an immediate enhancement of your stock.

You will be urged to approve this plan by the so-called Preferred Stockholders' Protective Committee, of which Harvey O. Mierke is Chairman. We are of the opinion that this Committee has been controlled by the Higbee management ever since it was organized. During the existence of said Committee, Mr. Mierke has been a Director of Higbee and has been continuously employed as attorney. Mr. Mierke was a Director of Higbee when that board approved the Plan of Reorganization filed April 18, 1938, and which plan recognized the Junior Debt in the hands of Messrs. Bradley and Murphy in its full amount of approximately \$2,000,000. This Protective Committee did not file one objection to the Junior Debt claim until on or about February 1st, 1939, when the last day for filing said objections had been fixed as of May 28, 1938, by the Special Master. (The New Preferred Stockholders' Committee had saved the day by filing objections within the time limit.) As a matter of fact, the Mierke Committee sat complacently by while a concerted attack was made by attorneys for Messrs. Bradley and Murphy to oust the New Preferred Stockholders' Committee from the proceedings. After that attack failed, the Mierke Committee filed certain objections to the Junior debt claim.

Do not be influenced by advice from the Preferred Stockholders' Protective Committee which was willing to help Messrs. Bradley and Murphy assert the Junior Debt claim in its full amount of approximately \$2,000,000.

You will be urged to approve the plan by the New Preferred Stockholders' Committee of which the undersigned Messrs. Potts and Boag were former members. This Committee did splendid work as far as it went, but unfortunately, was not willing to go far enough. Mr. Stanley Orr has served as one of the attorneys for this Committee since its inception. In June, 1940, Mr. Orr was elected a Director of Higbee. Messrs. Bloomfield and Orr, counsel for the New Preferred Stockholders' Committee, approved the Plan of Reorganization filed September 27, 1940, but did not submit the plan to the New Preferred Stockholders' Committee for approval or rejection until November 7th, 1940. On that date, Messrs. Potts and Boag, being half of a Committee of four, refused to approve the plan and resigned from the Committee. That Committee is now made up of Rufus K. Brown, Jr., Charles A. Heil, and George T. Roberts, and the records indicate that each member of the Committee owns ten (10) shares of First Preferred Stock. The New Preferred Stockholders' Committee pledged itself to principles which would never approve an allowance to Messrs. Bradley and Murphy of an amount more than their obligation to the Ball Foundation. This Committee, after the resignations of Messrs. Potts and Boag, upon the recommendation of its counsel, Messrs. Bloomfield and Orr, approved the plan filed September 27, 1940, which provided for issuance of \$600,000 in notes and notes for whatever balance was due on the \$69,673.71 participation in the Senior Debt and more than 13,500 shares of common stock with a book value of more than \$1,000,000 for the Bradley and Murphy claim. This Committee as now constituted, will tell you that it has accomplished practically everything it set out to accomplish. We, the undersigned, former members of said Committee, say to you that that is not a fact.

Messrs. Bradley and Murphy were important officers of the Van Sweringen interests which forced The Higbee Company to move from E. 13th Street and Euclid Avenue, to its present location on the Public Square, which move

was primarily the cause of Higbee getting into financial difficulties. Before moving Higbee to the Public Square, these interests took \$675,000 out of the Higbee Treasury in common stock dividends, and within six months after the last dividend was paid, these interests loaned Higbee \$1,500,000 (now called the Junior Debt), to start business in the new quarters, all of which was to promote the Van Sweringen interests more than those of Higbee. You have been deprived of dividends for a period of approximately ten years and it is estimated that another eight years will elapse before you receive dividends on the new preferred stock.

Are you now willing to approve a plan which will give to the above mentioned Bradley and Murphy a cash net return of approximately \$10,000, approximately 13,500 shares of common stock with a book value of more than \$1,000,000 together with control of your company?

You are entitled to a better deal on the treatment of this Junior Debt and it might well be that you will get a better deal if you do not approve this plan.

Since Messrs. Potts and Boag filed their objections to the plan as submitted on September 27, 1940, the following changes beneficial to your stock, were made to said plan:

1. Dividends are to start accumulating on the new preferred stock as soon as the plan is put into effect instead of waiting for eight or ten years until the Senior and Junior Debts have been paid in full.

2. The Second Preferred Stock is to be given common stock only instead of being on an equal basis with the First Preferred stock as proposed.

3. A \$75,000 top has been put on salaries of executives for a limited time. (This top would be kept in effect as long as any preferred dividends remain unpaid.)

4. The new Preferred Stockholders are to elect four Directors (instead of three), out of seven after the debts are paid so long as any preferred dividends remain unpaid. *(The Preferred Stockholders should elect all of the Directors so long as any Preferred dividends remain unpaid.)*

All of this was accomplished within three months. More can be accomplished if you will help.

If you desire any further information, please get in touch with this Committee. Without any obligation whatsoever, you may join in this fight to the finish, in order to get a better deal for the Preferred Stockholders of The Higbee Company.

This Committee is, and will remain, absolutely independent of the far reaching influences of The Higbee Company management. In case you do not approve this plan, we will be glad to have you so advise us.

We again say to you that you have everything to gain and nothing to lose by voting "NO" and earnestly urge you not to send in your approval of this plan.

Respectfully submitted,

INDEPENDENT PREFERRED STOCK-
HOLDERS' COMMITTEE,

By J. Fred Potts,
William W. Boag,
John W. Joughin.

YOUNG EXHIBIT 15.

Objections and Exceptions of Potts and Boag (Preferred Stockholders) to Confirmation of Amended Plan of Reorganization of Debtor Approved by the Court on July 2, 1941 (October 2, 1941).

(Case No. 36,119, U. S. D. C., N. D. O.—caption omitted.)

To the Honorable Paul Jones and Robert N. Wilkin, Judges of the District Court of the United States, for the Northern District of Ohio, Eastern Division:

Now come J. F. Potts and William W. Boag, holders of 250 shares and 10 shares respectively of the First Preferred Stock of the debtor, and respectfully object and except to the CONFIRMATION OF THE AMENDED PLAN OF REORGANIZATION of the debtor approved by the Court on July 2, 1941, upon the grounds and for the reasons hereinafter set forth:

EXCEPTION 1.

The amended plan is not fair and feasible for the reason that the Junior Indebtedness was not found to be a capital advance and subordinated to the First and Second Preferred Stock.

EXCEPTION 2.

The amended plan is not fair and feasible for the reason that it does not allow the said Junior Indebtedness only in the amount of \$100,000.00, that being the amount which Midamerica Corporation paid for said Junior Indebtedness at the Morgan Auction sale on September 30, 1935, when C. L. Bradley was a director of both Midamerica and Higbee, thus occupying conflicting fiduciary positions.

EXCEPTION 3.

The amended plan is not fair and feasible for the reason that it permits the allowance of claims purchased by C. L. Bradley and J. P. Murphy, pursuant to a contract made and executed while said C. L. Bradley was a director of Higbee, for more than \$600,000.00, the purchase price to said C. L. Bradley and J. P. Murphy; said claims including the Junior Indebtedness in the present face amount of \$1,551,041.66 and a participation of \$69,673.71 in the Senior Indebtedness.

EXCEPTION 4.

The amended plan is not fair and feasible in that it was not determined that said Junior Indebtedness was invalid and unenforceable in whole or in part.

EXCEPTION 5.

That that amended plan is not fair and feasible for the reason that the Special Master erroneously represented to this court, to the creditors and to the stockholders of the debtor, that the George and Frances Ball Foundation could cancel the said purchase agreement with said Bradley and Murphy and prove the Junior Indebtedness for its full amount.

EXCEPTION 6.

The amended plan is not fair and feasible for the reason that it authorizes the issuance to the holders of the Junior Indebtedness the majority of the common stock thereby delivering absolute control of the debtor to the said holders.

EXCEPTION 7.

The amended plan is not fair and feasible for the reason that it does not provide in the articles of incorporation of the reorganized corporation provisions authorizing cumulative voting.

EXCEPTION 8.

The amended plan is not fair and feasible for the reason that it deprives the preferred stockholders of the right to elect all the directors when there is a default in dividends which right they now have.

EXCEPTION 9.

The amended plan is not fair and feasible for the reason that it does not comply to Section 216 of Chapter X of the Chandler Act.

EXCEPTION 10.

The amended plan is not fair and feasible for the reason that it does not provide that until all the notes issued under the plan, together with all of the cumulative and current dividends on the New Preferred Stock have been paid, the Higbee Company shall not in any one fiscal year, pay an aggregate amount for executive salaries in excess of \$75,000.00. Said executives shall be deemed to include the President, Vice-President, Secretary and Treasurer.

EXCEPTION 11.

The amended plan is not fair and feasible for the reason that it does not disclose definitely who will eventually own the notes and common stock to be issued for the Junior Debt, which common stock represents a majority of all the common stock to be outstanding and constitutes permanent control of debtor.

EXCEPTION 12.

The amended plan is not fair and feasible for the reason that it does not disclose who will eventually own the notes to be issued for the unpaid balance on a \$69,673.71 participation in the Senior Indebtedness, which said participation was purchased by Messrs. C. L. Bradley and J. P. Murphy along with the Junior Indebtedness.

Objectors respectfully request that they be permitted to refile their OBJECTIONS AND EXCEPTIONS heretofore filed to THE AD INTERIM REPORT OF THE SPECIAL MASTER RECOMMENDING APPROVAL OF AMENDED PLAN OF REORGANIZATION, and that same be considered as objections to the CONFIRMATION OF THE AMENDED PLAN OF REORGANIZATION; and objectors further respectfully request that they be allowed to refile their Briefs heretofore filed in support of their objections, as a Brief to all of the objections filed to the CONFIRMATION OF AMENDED PLAN OF REORGANIZATION.

WHEREFORE, objectors request that the amended plan of reorganization be not confirmed and that the objections thereto be sustained.

Respectfully submitted,

.....
.....
Attorneys for Objectors.

YOUNG EXHIBIT 16.**Notice of Appeal of Potts and Boag (Preferred Stockholders) (November 14, 1941).**

(Case No. 36,119, U. S. D. C., N. D. O.—caption omitted.)

Notice is hereby given that J. Fred Potts and William W. Boag, owners of 250 shares and 10 shares of First Preferred Stock of The Higbee Company, respectively, the appellants above named, hereby appeal to the Circuit Court of Appeals for the Sixth Circuit, from the order, judgment and decree entered in these proceedings on October 17, 1941, confirming the Amended Plan of Reorganization of

The Higbee Company, debtor, and overruling appellants' objections thereto filed; and appellants also appeal to the Circuit Court of Appeals for the Sixth Circuit, on the order, judgment and decree entered in these proceedings on October 17, 1941, denying the application of appellants for the appointment of Special Counsel for the debtor and ratifying, adopting and confirming the ad interim report of Hon. Wm. B. Woods, Special Master, recommending denial of the application for the appointment of Special Counsel.

/s/ J. F. POTTS,

/s/ JOHN H. MCNEAL,

/s/ M. C. HARRISON,

/s/ HOMER MARSHMAN,

Attorneys for Appellants,

J. Fred Potts and William W. Boag.

YOUNG EXHIBIT 17.

Statement of Points on which Appellants Intend to Rely on Appeal (November 25, 1941).

(Case No. 36,119, U. S. D. C., N. D. O.—caption omitted.)

Now come appellants, J. Fred Potts and William W. Boag, by counsel and set forth hereinunder a statement of points which they will separately and particularly urge as error in the instant action, on the appeal of this case to the United States Circuit Court of Appeals for the Sixth Circuit.

First. That the Court erred in approving and confirming the amended plan of reorganization before it was decided who are ultimately to be the owners of the notes and the common stock to be issued for the Junior Indebtedness.

Second. That the court erred in finding that the Junior Indebtedness did not constitute a capital advance and in re-

fusing to subordinate said Junior Indebtedness to the First and Second Preferred Stock.

Third. That the court erred in failing to allow the Junior Indebtedness only in the amount of \$100,000, that being the amount which Midamerica Corp. paid for said Junior Indebtedness at the Morgan auction sale on September 30th, 1935, when C. L. Bradley was a Director of both Midamerica and Higbee, thus occupying conflicting fiduciary positions.

Fourth. That the Court erred in approving the amended plan in so far as it permits the allowance of claims purchased by C. L. Bradley and J. P. Murphy pursuant to a contract made and executed while the said C. L. Bradley was a director of Higbee, for more than \$600,000, the purchase price to said C. L. Bradley and J. P. Murphy, including the Junior Indebtedness in the present face amount of \$1,551,041.66, and a participation of \$69,673.71 in the Senior Indebtedness.

Fifth. That the court erred in approving the amended plan of reorganization before there was a determination as to the ownership of the Junior Indebtedness, particularly in view of the Master's ad interim report recommending approval of the amended plan of reorganization, wherein he took the position that the debtor was exposed to the risk of a large claim than that which was embodied in the plan if it should be determined that the ownership of the Junior Indebtedness was in the Ball Foundation, thus resulting in consents to the plan being obtained on this basis, when in fact, no such risk existed and the ownership of the Junior Indebtedness on its face was in Messrs. Bradley and Murphy.

Sixth. That the Court erred in approving the amended plan which deprives the Preferred Stockholders of the right to elect all of the directors when there is a default in dividends, which right they now have.

Seventh. That the court erred in holding that said amended plan complies with Section 216 of Chapter X of the Chandler Act.

Eighth. That the court erred in approving the amended plan which does not provide that until all of the notes issued under the plan, together with all of the cumulated

and current dividends on the New Preferred Stock have been paid, The Higbee Company shall not in any one fiscal year, pay an aggregate amount for executive salaries in excess of \$75,000.00 said executives to include the President, Vice Presidents, Secretary and Treasurer.

Ninth. That the court erred in refusing to appoint Special Counsel for Debtor.

J. F. POTTS,

JOHN H. McNEAL,

M. C. HARRISON,

HOMER MARSHMAN,

Attorneys for Appellants,

J. Fred Potts and William W. Boag.

ACKNOWLEDGMENT OF SERVICE.

Service of the above Statements of Points on which Appellants intend to rely on appeal is hereby acknowledged this 25th day of November, 1941.

GARDNER ABBOTT OF JONES, DAY, COCKLEY & REAVIS,

by F. E. J.,

Attorneys for The Higbee Company, Debtor.

YOUNG EXHIBIT 18.

Statement Made by J. F. Potts at Hearing of December 18, 1940, before the Special Master, contained in Potts' Printed Record on Appeal, pp. 263, 264, which was Designated by Potts for Inclusion in Printed Record.

Mr. Potts: If the Court please, I want to make my position clear here, to start with.

Originally I was on the new stockholders' committee. That committee, on this plan, split wide open, fifty-fifty. I talked to Mr. Orr recently and asked him as to whether or not it was necessary—I don't know, but I asked that he do

not withdraw any objections filed by the committee of which I was a member without my consent. I verified several of those objections, and I want to prosecute them in my own name now, if it is necessary in this way to preserve those objections.

A new stockholders' committee will be formed, and whether or not we call it a new new stockholders' committee, I don't know, but it will have to be given some name so that we can differentiate it from the other stockholders' committee, and I think, after talking with Mr. Ewing, that the objections can be consolidated so that you will have to deal with just one committee in the very near future.

Now, as an attorney who has just gotten into this picture, and I don't know all of the details that have gone on, and I don't know all the facts, I am just trying to find them out just as fast as possible, in the very near future, maybe before Friday, if we are going to have another meeting Friday, I want to make an application to this Court for the appointment of disinterested counsel or new counsel for the debtor.

One of the reasons, and I may be wrong about it, but one of the reasons that I will set forth in the application is the fact that present counsel, as far as I know, has never objected to the amount asserted by the holders, or the so-called holders, of the junior debt.

I think that Mr. Abbott was a party to the original plan, and it went in as claimed for \$1,800,000, or something like that.

YOUNG EXHIBIT 19.

Excerpt from Proceedings before Special Master re Applications for Allowances, May 14, 1942, pp. 227-240 and 263-265, incl.

J. FRED POTTS, CROSS.

(227) Q. Now, after you left the New Preferred Stockholders' Committee you formed another committee, didn't you? A. I don't know as you could call it another committee. We didn't do anything about forming another com-

mittee until after the plan was approved, I think, July 2, 1941.

Q. What did you do then? A. Sent out a letter to the stockholders.

Q. What was the letterhead? A. Independent Stockholders' Committee.

Q. And the signature to that communication was also Independent Preferred Stockholders' Committee, wasn't it? A. That is right.

Q. By whom? A. Boag, Joecken and Potts.

Q. So that you represented at least that a new Preferred Stockholders' Committee had been formed, did you not? (228) A. That is right.

Q. What became of that committee? A. Well, after the plan was confirmed Mr. Boag and Mr. Potts were the only ones that were willing to press our objections any further and that probably was the end of the committee other than whatever was left of it represented by Boag and Potts.

Q. Well, now, did you receive any replies to this communication that you sent out on the letterhead of the Independent Preferred Stockholders' Committee? A. A few, yes.

Q. Did any of the stockholders who replied express any interest in having this committee represent them? A. Well, some of them expressed a desire that the objections be prosecuted.

Q. Were they ever given any notice that this committee had been dissolved? A. No; they weren't.

Q. However, Mr. Joecken—is that the name? A. Joecken.

Q. —who was one of the members of the committee, didn't want to go any further with it after the confirmation of the plan at that time? A. That is the information that Mr. Boag brought back to me. I never talked to Mr. Joecken. As a matter of fact, Mr. Boag did not want to put any money in any (229) appeal himself.

Q. Did he put any money in an appeal? A. No.

Q. Well, now, after Mr. Joecken had, in effect, withdrawn from this committee, what did you and Mr. Boag do? A. We filed our notice of appeal.

Q. Did you consider, when you filed that notice of appeal, that you were acting only for yourself and Mr. Boag or for other preferred stockholders? A. Acting only for

Mr. Boag and J. Fred Potts. Anything that he accomplished, of course, would inure to the benefit of all of them. We couldn't prevent that.

Q. You didn't want to prevent it, did you? A. I beg your pardon?

Q. You didn't want to prevent it, did you? A. We certainly did not.

Q. But you hadn't told any of the preferred stockholders, that had written in to you regarding the Independent Stockholders' Committee, that you were no longer representing their interest; is that true? A. No; I don't think we did. We didn't have any more communication at all, unless it was by telephone or somebody called up, or we called somebody up, or some (230) stockholders called us up. The results of the money spent didn't justify many more communications going out.

Q. As far as some of these people who wrote you were concerned though, they might reasonably have thought that the Independent Stockholders' Committee was still representing their interests and continuing in the course indicated in that letter of July 10? A. That might be true.

Q. Mr. Potts, do you have an extra copy of that letter? A. I don't know as I have one here, but I have one at the office.

Q. Mine is pretty much marked up with stamps from the various offices of S. E. C. I would like to offer it in evidence.

By the Master:

Q. Will you furnish one for the record? A. Yes, sir.

The Master: Mark it Potts Exhibit 2.

A. All right. We are making no claim for any money spent at all. Of course, I couldn't make any claim for any money spent on that letter because nothing was accomplished after that letter was sent out.

By Mr. Sherwood:

Q. Then you and Mr. Boag thereafter appealed from (231) the order confirming the plan of reorganization; that is correct, isn't it? A. That is right; yes.

Q. What happened after that? A. The record was submitted and lodged, I think, on February 6, and the ap-

peal was dismissed on March 9 or 10; some date like that; around that date.

Mr. Joseph: March 11.

A. The appeal was dismissed on March 11, Mr. Joseph says.

Q. Will you tell us the circumstances under which that appeal was dismissed? A. Well, Mr. Boag's stock and the stock in my name was sold to Messrs. Bradley and Murphy.

Q. For how much was it sold? A. I don't mind answering it, but I will answer it under objection because it is entirely immaterial.

The Master: I think it is material in this proceeding and I think you may answer. Objection overruled.

A. The total amount was \$115,000.

Q. Was that paid in cash? A. Most of it.

Q. How much of that amount was paid to Mr. Boag?

A. Twenty thousand dollars.

(232) Q. And the balance to you? A. Yes, sir. I want an objection and exception to all these questions.

Q. The total amount of stock that you and Mr. Boag sold to Mr. Bradley and to Mr. Murphy was 260 shares; is that correct? A. That is correct.

Q. That would mean that it had a par value of \$26,000?

A. That is correct.

Q. Have you any idea what the market value of it was at that time? A. From sixty to sixty-five.

Q. Have you any idea what induced anybody to pay \$115,000 for stock with a par value of \$26,000 and a market value considerably less? A. I think there was a desire to end this litigation.

Q. So that in a sense you were selling something more than your stock, I take it? A. I think so.

Q. You were selling the appeal which you had taken in behalf of yourself and Mr. Boag; that is a fair statement, isn't it? A. I think so.

Q. Was the appeal, that you and Mr. Boag took, a part of the program that was outlined to the preferred (233) stockholders in your letter of July 10? A. It might have been a part of it. The objections, I think, confirmed what we said we would object to.

Q. Were there any other people interested in buying this stock at the time that you sold it to Mr. Bradley and to Mr. Murphy? A. No; I don't think so.

Q. Mr. Young wasn't interested? A. Apparently not.

Q. Was he interested in having you go on with the appeal? A. Mr. Young intervened, or made an attempt to intervene, as a preferred stockholder and asked the Circuit Court of Appeals to dismiss the appeal.

Q. He didn't offer you anything to go on with the appeal, did he? A. No. The dismissal of the appeal was urged and entered into by Higbee.

Q. By who? A. By Higbee and I don't know but what I might say that the S. E. C. helped to dismiss it.

Q. Well, the S. E. C. urged that it be dismissed on the merits, didn't it? A. I forget the exact wording of the telegram. There seemed to me to be a very keen desire to end the litigation and one of the things that might have influenced that dismissal was the fact that this note had gotten (234) into other hands and counsel for Higbee and counsel for the S. E. C. urged that if that note got into other hands it might not be as vulnerable as in the hands of Mr. Murphy and Mr. Bradley. So, if your theory is correct, the chances of the appeal succeeding were lessened quite a bit by the sale of that note to Mr. Young by the Ball Foundation.

Q. Well, that is a conclusion which might be argued at some length, isn't it? A. Quite right. I argued quite strenuously against it for many a day, but I was quite alone though in my arguments.

Q. Now, in this letter of July 10, by the Independent Preferred Stockholders' Committee, which has been introduced in evidence, the statement is made as follows:

"These objections were filed by Messrs. Potts and Boag, owners of 250 shares and 10 shares of the first preferred stock, respectively."

Is that a correct statement? A. I think it was. I had legal title to 250 shares and I thought Mr. Boag owned his shares. I felt reasonably sure that he did.

Q. Substantially the same statement is made with respect to the ownership at least in the application now (235) pending before this court entitled, "Application of J. Fred

Potts for the approval of sale of stock of debtor after confirmation"; is that correct? A. Yes; I think that is true. However, that has been withdrawn.

Q. Well, I take it that it can only be withdrawn with the permission of the Court. I don't know how the Court has ruled on it.

The Master: Until the other paper is tendered I won't pass on this.

Q: Now, to your application for compensation there is an affidavit annexed which was sworn to on the 18th day of April of this year, in which the statement is made as follows: That the deponent has not at any time owned, acquired or transferred any claims against, or stock of, the debtor, or any beneficial interest therein, and that no claims against, or stock of, the debtor have been acquired or transferred for the account of the deponent after the commencement of the proceedings herein except 250 shares of first preferred stock which these proceedings show deponent to be the owner of, and which shares of stock deponent sold after the confirmation of the plan, to-wit, on or about March 7, 1942; that is correct, isn't it? (236) A. In all details I do not think it quite states the facts.

Q. The question I asked you was whether the statements in that affidavit, which you filed, were correct. That affidavit was filed, wasn't it? A. I filed it and I filed a supplemental and amended affidavit which more truly expresses what really happened.

Q. And that is an affidavit that was sworn to on May 14, 1942, in which the statement is made as follows: That no claims against, or stock of, the debtor, in which he had a beneficial interest, directly or indirectly, and no beneficial interest, directly or indirectly, in any claims against, or stock of, the debtor has been acquired or transferred by him or for his account after the commencement of those proceedings? A. That is a correct statement.

Q. How do you explain the difference between the statement in your affidavit of April 18 and that in your affidavit of May 14? A. I don't believe that there is much difference in actual facts excepting the one doesn't relate all the facts.

Q. Will you state what all the facts are? A. Well, the facts are just as stated there. I cannot (237) state

them any better. It states that there was no stock sold or bought by me, or any in which I had any beneficial interest, during these proceedings.

Q. Well, now, going back to the time when you first became a member of the New Preferred Stockholders' Committee, of which Messrs. Bloomfield and Orr were counsel, you testified that 250 shares of stock, if I recall correctly, were transferred to you? A. That is correct.

Q. Is it your claim that you had no beneficial interest in that stock at any time? A. That is quite correct. I am on record in these proceedings.

Q. You had no interest in that stock at all? A. No interest whatever.

Q. Why did you have it transferred into your name when you became a member of that committee? A. It belonged to Mrs. Potts and she didn't want to serve as a member of any committee, and I wouldn't have her serving on a committee and being asked to sign papers, and to be interrogated by the opposition to the committee and various other things.

Q. Well, there was no compulsion on the part of either of you to serve on any committee? (238) A. That is right. I took legal title for convenience.

Q. And was it stated in the communications sent out by that committee that you were the owner of 250 shares of stock? A. I think it was.

Q. It was stated in the letter of July 10; the letter of the Independent Preferred Stockholders' Committee, that you were the owner of that stock? A. That is right. I think that is true. I was the legal owner of it.

Q. There was no intimation in any of those communications, was there, that you were holding the bare legal title to that stock? A. No. This record has in it testimony to that effect and it is open to anybody who is interested. Our committee was asked by, I think, Messrs. Bradley and Murphy—I think a request was made to dissolve our committee. Mr. Bloomfield followed that more than I did. He can tell about those matters in greater detail than I can.

Q. Well, now, when you— A. When I was examined I told the exact provisions under which I held that stock and that is a matter of record in these proceedings.

(239) Q. Now, when you ultimately sold this stock to Messrs. Bradley and Murphy, with whom did you negotiate?

Mr. Potts: I object to that question as not being material.

The Master: You may answer. Objection overruled.

A. Mr. Wykoff was one of the gentlemen.

Q. Did you tell him that you didn't own this stock?

A. No; I don't think I told him. I think he asked me if—I think one of the first questions he asked me was if—strike that out. No; I did not say anything about it. He didn't inquire.

Q. And the stock certificate or certificates were in your name? A. The stock certificate, one certificate, was in my name and it was endorsed in blank on the day it was put in my name and turned over to Mrs. Potts.

Q. So that you told Mr. Wykoff that you were getting that certificate from Mrs. Potts to deliver to him? A. I did not.

Q. So, as far as you know, he had every reason to believe that you were the owner of the stock yourself? A. I think I was. I did have legal title to it. In that connection, I wish to say that I have a blanket power of attorney, which I will be very glad to introduce (240) in evidence, if you want to see it, which has been in my possession for many years which would give me the right to exercise it without any consent. I will tell you very frankly that Mrs. Potts was asked about the sale and consented to it.

Mr. Sherwood: That is all.

(263) Mr. Sherwood: Now, with respect to the application for approval of the sale, which some attempt has been made to withdraw, I think I should make some comment on that.

It is perfectly plain from Mr. Potts' testimony that he was not only selling the stock, he was selling an appeal, and it can be drawn from that testimony that other people than Mr. Potts and Mr. Boag were interested in that appeal. Whether we call it a class action, anything that resulted from that appeal, except selling it in this way, would have inured to the bene-

fit or the detriment, however it might work out, of the whole class of stockholders.

I don't think that this Court should be called upon to approve a transaction involving the sale of an appeal, which is what, to a substantial extent, this amounts to. It was also, of course, a sale of stock. It seems to me that where others are interested in an appeal the sale of the appeal in that way is an unconscionable action.

(264) One other thing. The action of the Circuit Court of Appeals in dismissing this appeal does not necessarily force the conclusion that the Court concluded that it was an individual appeal and that others were not interested in it. Mr. Young made application to intervene in the proceedings and the Court refused to grant it. Mr. Young's purpose, obviously, in wanting to intervene, was to continue with the appeal and even if the appeal was a representative or class appeal, the Court, in its discretion, could dismiss it and it might very well appear to the Court that the motives of Mr. Young, who had, through counsel, expressed his approval of the plan, and the appeal was, of course, from the confirmation of that plan, the circumstances under which he then wished to intervene were not such as to induce the Court to grant the application. Under these circumstances, it may well be that in some other Court, at some other time, some or all of the preferred stockholders, including those who may have thought that Mr. Potts, in sending out a letter on the letterhead of the Independent Preferred Stockholders' (265) Committee, was representing their interests, have some right to an accounting for what Mr. Potts cleared in this transaction over and above the fair value of the stock that he sold. I throw out that idea. It isn't anything that I believe this court has jurisdiction over. It is, nevertheless, a possibility and some preferred stockholder may wish to investigate it.

YOUNG EXHIBIT 20.**Excerpt from Report of Special Master of August 1, 1942,
re Application of J. F. Potts and J. H. McNeal for
Compensation.**

"Application, \$45,000, 707 hours, at \$63.65 per hour. Recommendation, none.

Participation of J. Fred Potts, counsel in this proceeding, began in the Summer of 1938 when Potts became a member of the New Preferred Stockholders Committee. Prior thereto counsel for that committee attacked the so-called Junior Indebtedness of Debtor, which opposition was continued until that controversy was compromised as appears in the Plan of Reorganization.

After the plan was submitted in September, 1940, Potts and William W. Boag resigned from the Committee, Potts not approving the 1940 plan. Conflict in the version of the facts appeared in the hearing. Attorney Bloomfield, counsel for the Committee, testified that the reason why Potts and Boag left the Preferred Stockholders Committee was that Bloomfield and his associate, Judge Orr, were "convinced that Potts was not representing all preferred stockholders and concluded that he was only representing himself" (R. p. 258). Subsequent events seemed to confirm this view.

Thereafter Potts and Boag objected to the 1940 plan, objected to the Master's report approving the plan, appeared in opposition in the District Court where the plan was approved on July 2, 1941, and when it was confirmed by the court on October 17, 1941, they appealed as "owner of 250 shares and 10 shares of the First Preferred Stock of The Higbee Company, respectively." From the personal point of view of applicant and Boag the appeal has proved quite successful for as a result of circumstances in no way related to its merits, the appeal acquired a substantial nuisance value. As applicant says, "there was a desire to end this litigation."

Applicant and Boag, who had previously held themselves out as "a committee organized solely for the benefit of preferred stockholders," dismissed their appeal pursuant to an arrangement with Charles L. Bradley and John P. Murphy by which they sold their First Preferred Stock, 260 shares of which applicant held legal title to 250 shares,

for \$115,000; which stock had a par value of \$26,000 and a market value of considerably less.

The testimony of Potts is that he did not consider the sale price of his stock to contain any compensation for services rendered by him in the proceeding, although such recovery was realized in the course of the settlement of the appeal. In such recovery the preferred stockholders, including those who responded to his appeal for support, have not shared although obviously they would have shared in any benefits which might have accrued if the appeal had been successfully prosecuted to a conclusion.

To his application for an allowance, Potts attaches an affidavit that he is the owner of 250 shares of First Preferred Stock which was sold after the confirmation of the plan on March 7, 1942. He also filed an application with the court to approve this sale which was also referred to the Master by the District Judge on April 18, 1942, and a report of the Special Master on that application is this day transmitted to the District Court, recommending denial of the application.

When his application was filed with the court to approve the sale, apparently he believed that an approval of the sale would free his application for compensation from the disability from having trafficked in stock during the reorganization. During the hearings on allowances, Potts filed a supplemental amended statement to be attached to his application for fees (R. p. 209) apparently then believing that the approval of the sale by the court would not permit the allowance of fees and in the new affidavit said that he had never had any beneficial interest in the stock. The evidence showed that the 250 shares of stock had originally stood in the name of Margaret W. Potts, wife of applicant, and was transferred to him in 1938. Apparently believing that he can now comply with the law, Potts says that he was the bare holder of naked legal title and at all times Mrs. Potts was the beneficial owner. Whatever may have been the real fact as to the ownership, for the purposes of this proceeding, applicant had a real interest as well as being the holder of the legal title, which in view of the statute seems to be sufficient to bar him from compensation. Sec. 249 of the Bankruptcy Act as to persons seeking compensation for services provides, "no compensation

or reimbursement shall be allowed to any committee or attorney or fiduciary capacity who at any time after assuming to act in such capacity has purchased or sold such claims or stock * * * without the prior consent or subsequent approval of the judge. * * *

Obviously court approval of applicant's sale of stock would not affect the operation of this statute as a bar to compensation. The phrase "without the consent or approval of the judge" applies only to transfers other than by purchase or sale, as acquisition through bequest. Such was the construction of the Circuit Court of Appeals of the First Circuit as in *Otis & Co. v. Insurance Building Corp.*, 110 Fed. (2d) 333, 42 ABR ns 542 (C. A. 1, 1940).

Apparently applicant is doubtful of his position for in his brief proceeds on the assumption that he will be permitted to withdraw his application for approval of the sale and amend the affidavit under Sec. 249 as heretofore indicated. Sec. 249 is the codification of the fiduciary rule previously imposed by courts in proceedings under Sec. 77B. In leading cases the courts have disallowed fees to committee members who purchased and sold securities of companies undergoing reorganization on the ground that such activity was in conflict with proper standards of fiduciary conduct. In re *Paramount Publix Corporation*, 12 Fed. Sup. 823, 36 ABR 786 (S. D. N. Y. 1935); in re *Republic Gas Corporation*, 35 Fed. Sup. 300 (S. D. N. Y. 1936).

There seems to be no judicial decision under Sec. 249 since the Chandler law was enacted, dealing with the precise situation here involved. In the recent case of *Los Angeles Lumber Products Co.*, 37 Fed. Sup. 708, 45 ABR ns 370 (S. D. Cal. 1941), securities of debtor corporation were purchased during the proceeding by a member of the law firm which represented the debtor. While this partner had no active part in the reorganization, the court denied compensation to the firm or any of its members, stressing the possible indirect benefit which one member of a firm might receive from allowance to another.

This application for fees appears as the effort of J. Fred Potts, as John H. McNeal, Esq., who is associated as applicant with Potts, never made an appearance at the hearings before the Master, and McNeal seems to be associated in a joint venture with Potts on a contingent basis.

He is not a partner of Potts, never has appeared, never filed any pleadings or objections, and never participated in negotiations.

While it does not appear that McNeal participated in the sale of stock or that his conduct was in any way subject to criticism, the record shows that he was associated with Potts in a representation of Potts and Boag and their committee, so Potts testified. Also the application contains their affidavits under Sec. 62d of the Bankruptcy Act in which each denies that an agreement or understanding exists between them for the division of compensation.

In view of the association with Potts in this joint venture, McNeal is not entitled to compensation under the doctrine of *Re Los Angeles Lumber Products Co., supra*, for under any agreement of their venture existing between them, Potts would benefit directly from any allowance made to McNeal, also any allowance to McNeal would indirectly benefit Potts as it would affect any possible obligations which Potts may have to compensate McNeal for his services in this proceeding.

Obviously Potts regarded this stock as giving him a bargaining position and his whole effort was to realize on that position. At one time he represented himself, Boag and a Mr. Joucken, as a committee on behalf of preferred stockholders in a circular letter sent out, yet the appeal was taken only by himself and Boag. As pointed out by the representative of the SEC, if Potts' wife is to be considered the beneficial owner of the stock, then Potts in selling had an indirect beneficial interest in the consideration, and Sec. 249 prohibits compensation (R. p. 260). On the other hand, if Potts were the owner of the stock, considering the statement of his first affidavit attached to the application, under Sec. 249 he is barred from compensation and no order of the court can change the situation. Under the rule of the *Otis Case, supra*, the representative of the commission further points out that this court should not have been called upon to approve a transaction involving the sale of an appeal disguised as a sale of stock (R. pp. 260-5).

The conclusion is that Sec. 249 prohibits an allowance of any compensation to either Potts or McNeal, with recommendation accordingly."

YOUNG EXHIBIT 21.**Objections and Exceptions of Potts and McNeal (Applicants) to Report of Special Master on Allowances.**

(Case No. 36,119, U. S. D. C., N. D. O.—caption omitted.)

Now come J. Fred Potts and John H. McNeal, applicants herein, and respectfully object and except to the report of the Honorable Wm. B. Woods, Special Master, recommending that no allowances of any compensation be made to either applicant for legal services rendered in these proceedings on the grounds and for the reasons that the Special Master erred as hereinafter set forth.

EXCEPTION 1.

The Special Master erred in finding that Section 249 prohibits an allowance of any compensation to either J. Fred Potts or John H. McNeal.

EXCEPTION 2.

The Special Master erred in finding that applicant J. Fred Potts had a direct or indirect beneficial interest in the 250 shares of Higbee First Preferred Stock sold on March 7, 1942, when the only testimony before him indicated that applicant held a bare legal title.

EXCEPTION 3.

The Special Master erred in finding that applicant John H. McNeal was associated in a joint venture with applicant J. Fred Potts on a contingent basis.

EXCEPTION 4.

The Special Master erred in finding that applicant J. Fred Potts would benefit directly from any allowance made to applicant John H. McNeal.

EXCEPTION 5.

The Special Master erred in finding that applicant J. Fred Potts regarded this stock as giving him a bargaining position and that his whole effort was to realize on this position.

EXCEPTION 6.

The Special Master erred in finding that this application for fees appears as the effort of J. Fred Potts because applicant John H. McNeal never made an appearance at the hearings before the Special Master.

Respectfully submitted,

J. F. POTTS AND JOHN H. McNEAL,
502 Auditorium Building, MAin 1926,
Attorneys for Applicants.

YOUNG EXHIBIT 22.

Brief in Support of Exceptions and Objections of Potts and McNeal (Applicants) to Report of Special Master on Allowances.

(Case No. 36,119, U. S. D. C., N. D. O.—caption omitted.)

*To The Honorable, The Judges of
The District Court of the United States,
For the Northern District of Ohio,
Eastern Division:*

EXCEPTIONS 1 AND 2.

Inasmuch as exceptions 1 and 2 involve substantially the same facts, we will treat them together in this Brief.

It is quite apparent that Sec. 249 of the Bankruptcy Act has no application to that part of the petition for compensation which has to do with the claim made by John H. McNeal. The facts show conclusively that John H. McNeal was at no time a partner of J. Fred Potts, had no interest whatsoever in any stock or claims of this debtor during these proceedings or at any other time, and that he rendered valuable legal services herein.

The facts of the instant case show that some time in 1938, the bare legal title to 250 Shares of First Preferred Stock of the debtor was transferred to applicant J. Fred

Potts, solely for the sake of the convenience to the New Preferred Stockholders Committee, and at the request of counsel for the New Preferred Stockholders Committee; that this fact was made known to the Special Master shortly thereafter together with the fact that real beneficial ownership of the stock remained in applicant's wife and that applicant J. Fred Potts had agreed to either return the stock to her together with whatever was realized on the outside or in case the stock was not returned to her, then in that event, whatever was realized from same; that at no time during these proceedings did applicant J. Fred Potts have any beneficial interest direct or indirect in said stock; that at all times herein mentioned, the beneficial interest and control of this stock were vested in applicant's wife; that said stock was sold with her consent and approval on March 7, 1942. The facts further show that J. Fred Potts served as a member of the New Preferred Stockholders Committee from some time in 1938 to November 7, 1940; that during said period, he verified certain pleadings filed before the Special Master, and though the above facts were known to said Special Master and all adverse parties, no objections were voiced by anybody.

The uncontradicted fact is that applicant J. Fred Potts resigned from the New Preferred Stockholders Committee on November 7, 1940, because he did not approve the Amended Plan filed on September 27, 1940, which plan had been approved by counsel for the New Preferred Stockholders Committee without authority from said Committee. The Special Master recites that a conflict in the version of the facts concerning the resignation of applicant Potts from said Committee appeared in the hearing because Attorney Bloomfield testified that:

"the basic reason that Mr. Potts and Mr. Boag left the Stockholders Committee for which we were counsel, was that both Judge Orr and myself were convinced that Mr. Potts was not representing all of the Preferred Stockholders and we finally reached the conclusion that Mr. Potts was representing himself."

We fail to see the significance or relevancy of Mr. Bloomfield's opinion (if it is an opinion—to us it doesn't make sense by any liberal construction of the English language) but now that the question has been raised, we re-

spectfully call the court's attention to the following accomplishments for which we claim credit after the New Preferred Stockholders Committee, the Preferred Stockholders Protective Committee and counsel for debtor had approved the Amended Plan filed September 27, 1940, to-wit:—

A. Under an amendment to the Amended Plan, the holders of Old First Preferred Stock shall receive one share of New Preferred Stock for each share of the old and one-third share of New Preferred Stock and two-thirds share of New Common Stock for each One Hundred Dollars of dividends accumulated to the date of the final confirmation of the Plan.

(Before the Amended Plan was amended in this respect, the holders of the Old First Preferred Stock were to receive for each share thereof, one share of New Preferred Stock and New Common Stock measured at the rate of one share for each One Hundred Dollars of dividends accumulated to the date of the final confirmation of the Plan.)

This amendment will give the holders of the First Preferred Stock approximately 2754 additional shares of the New Preferred Stock which at \$100.00 a share means \$275,400.00.

B. Under an Amendment to the Amended Plan, holders of the Old Second Preferred Stock shall receive for such stock, New Common Stock measured at the rate of one share of said New Common Stock for each share of such Old Second Preferred Stock and one share of New Common Stock for each One Hundred Dollars of dividends accumulated to the date of the final confirmation of the Plan.

(Before the Amended Plan was amended, the holders of the Old Second Preferred Stock were to receive for each share thereof, one share of New Preferred Stock and New Common Stock measured at the rate of one-half share for each One Hundred Dollars of Dividends accumulated to the date of the final confirmation of the Plan.)

It is hard to estimate how much this amendment benefited the Old First Preferred Stockholders in cash but it reduced the New Preferred Stock to be issued to others by 4521 shares. At \$100.00 a share, this means that \$452,100.00 of Preferred Stock was placed in Common Stock and

reduced the Preferred dividend accumulated and/or charges in the amount of \$22,705.00 yearly. Over a period of ten years, this accumulation would have amounted to, \$227,050.00.

C. Under an Amendment to the Amended Plan the New Preferred Stock shall have a par value of \$100.00 per share and shall be entitled to receive dividends at the rate of \$5.00 per share per annum, payable quarterly and said dividends shall be cumulative *from the date of issue* of such stock which shall be as of the date of the final confirmation of the Plan.

(Before the Amended Plan was amended, it provided that no dividends were to be declared or paid upon the New Preferred Stock until final payment of the indebtedness represented by the new notes to be issued for Senior Bank, Senior Rent and Junior Indebtedness. This would have meant that approximately 14,000 shares of New Preferred Stock would not have accumulated any dividends for a period of ten years.)

If the notes issued for the Junior Indebtedness are not paid before their maturity, this one item will inure to the benefit of the Preferred Stockholders in the amount of approximately \$700,000.00 or at the rate of \$70,000.00 per year.

D. Under an Amendment to the Amended Plan, the New Preferred Stock voting as a class shall at all times have the right to elect three members of the Board of Directors of Higbee, consisting of seven members and after the payment in full of the new notes evidencing the Senior Rent Indebtedness, and until the payment in full of all accumulations of dividends on the New Preferred Stock, the holders of the said New Preferred Stock shall be entitled to elect four Directors.

(Before the Amended Plan was amended, the New Preferred Stock was to be entitled as a class to elect three members of the Board of Directors and no more, regardless of default in dividend payments on said stock.)

It is absolutely impossible to put any money value on this amendment but it certainly puts the control of the Company in the hands of the Preferred Stockholders after the Senior Rent Indebtedness is paid, and so long as dividends remain unpaid.

E. Under an Amendment to the Amended Plan, without the written consent of the holders of 51% in amount of the notes evidencing the Senior Bank Indebtedness, the holders of 51% in amount of the new notes evidencing the Senior Rent Indebtedness and the holders of 51% in amount of the new notes evidencing the Junior Indebtedness, Higbee shall not, in any one fiscal year, pay an aggregate amount for executive salaries in excess of \$75,000.00. Executives shall be deemed to include the President, Vice Presidents, Secretary and Treasurer of Higbee, but to exclude merchandising managers, heads of departments and other subordinate officers of Higbee.

(Before the Amended Plan was amended, there was no limit on what could have been paid to the Executives of Higbee.)

It is impossible to estimate how much this amendment will save Higbee, but applicants are of the opinion that it will save thousands of dollars. It will at least remove the temptation for the Executives to vote themselves exorbitant salaries.

Applicant J. Fred Potts fought for the above amendments and we submit that those accomplishments which inured to the benefit of all the First Preferred Stockholders, don't reflect that Mr. Potts was looking after his own interests alone. We don't deny that Mr. Potts was looking after his family's interest in Higbee. He spent his own money and gave of his time freely for several years as a member of the New Preferred Stockholders Committee without the slightest hope of being reimbursed or compensated, and that is more than can be said for Messrs. Bloomfield and Orr who now accuse Potts of having had nobody's interest at heart but his own.

Sec. 249 of the Bankruptcy Act reads as follows:

"Any person seeking compensation for services rendered or reimbursement for costs and expenses incurred in a proceeding under this chapter shall file with the Court a statement under oath showing the claims against, or stock of, the debtor, if any, in which a beneficial interest, direct or indirect, has been acquired or transferred by him or for his account, after the commencement of such proceeding. No compensation or

reimbursement shall be allowed to any committee or attorney, or other person acting in the proceedings in a representative or fiduciary capacity, who at any time after assuming to act in such capacity has purchased or sold such claims or stock, or by whom or for whose account such claims or stock have, without the prior consent or subsequent approval of the Judge, been otherwise acquired or transferred." (Italics ours.)

A cursory reading of Sec. 249 above quoted shows conclusively that said section applies to only those who have acquired or transferred stock or claims of a debtor in which they had a beneficial interest direct or indirect, during the time specified.

In the instant case, Sec. 249 would apply to the acquisition and transfer of the above mentioned 250 shares of prior Preferred Stock of this debtor by applicant J. Fred Potts only in the event that a husband has a beneficial interest in the personal property of his wife as a matter of law. There is no such law in the State of Ohio nor do we know of any Federal Law which creates such a beneficial interest. *That being the case, Sec. 249 has no application in the above mentioned transactions.*

Further, Sec. 249 was put into the Bankruptcy Act for the sole purpose of discouraging and or preventing those connected with reorganizations from buying or selling securities of distressed companies to their own financial advantage by virtue of inside information, which said parties may have by virtue of their connection with reorganizations under the Act. In the instant case, there was no buying or selling of stock by anybody connected with the reorganization proceedings with inside information. The stock in question had been in one family for a period of over twenty years. There was testimony before the Special Master to the effect that one of the reasons which prompted the sale of said stock on March 7, 1942, was furnished by the Special Master himself in his interim report recommending the approval of the Amended Plan of the reorganization of The Higbee Company, filed September 27, 1940, in which report he said:

"The objectors take the position that the purchase of this Junior Indebtedness by Bradley and Murphy,

one of whom was a director of The Higbee Company at the time of such purchase, was a breach of the fiduciary duty on the part of Mr. Bradley to Higbee and therefore the claim should be allowed only in the amount of \$600,000. Without passing upon the merits of the objectors' position, let us assume that their contention is correct. There is no reason to suppose that the Ball Foundation will not at this time cancel the purchase agreement with Bradley and Murphy and prove the Junior Indebtedness for its full amount of approximately \$1,913,000 as of September 30, 1940. It would seem that in such event the Ball Foundation can prove for this amount as it clearly had no connection with or relationship to the Debtor. This would result in the liabilities of the Debtor being increased by an amount in excess of \$1,313,000, all of which would come before the First Preferred Stock."

At the time the stock in question was sold, the Ball Foundation had sold the Bradley-Murphy note together with the Junior Debt and other securities of Higbee to Robert R. Young, and the new owner was as free of fiduciary relationship to the debtor as the Ball Foundation. The above position taken by the Special Master was concurred in by the SEC and counsel for debtor.

If the above position taken by the Special Master, SEC and counsel for debtor was sound, then, in fairness to the other Stockholders, the appeal taken by Messrs. Potts and Boag should have been dismissed, if for no other reason, for the purpose of removing the possibility of an additional \$1,313,000.00 being asserted ahead of said stock. It appears to us that under the circumstances, this sale of stock and subsequent dismissal of the appeal which are now being condemned by the Special Master and SEC should have received their blessings. Otherwise, they seem to have used an argument in which they had very little faith.

Special Master recites that there seems to be no judicial decision under Sec. 249 since the Chandler Law was enacted dealing with the precise situation herein involved. He then goes on to cite the case of *Los Angeles Lumber Products Company*, 37 Fed. Sup. 708 (S. D. Calif. 1940), where securities of debtor corporation were purchased

during the proceedings by a member of the law firm which represented the debtor. He recites that this partner had no active part in the reorganization. As a matter of fact, the case recites that this partner had very little connection with the case. Compensation was not allowed in this case but we do not feel that the facts are parallel to the instant case in any respect. The type of trading done in the *Los Angeles Lumber Products Company* case was exactly what Sec. 249 was meant to prevent.

EXCEPTION 3.

There was no evidence before the Special Master which justified his finding that applicant John H. McNeal was associated in a joint venture with applicant J. Fred Potts on a contingent basis. John H. McNeal was asked to perform and render legal services for two stockholders of the debtor Company and for such services he was to look to the debtor company for compensation as provided by law. This finding of the Special Master is not based on facts and is a mere opinion without foundation.

EXCEPTION 4.

The Special Master erred in finding that applicant J. Fred Potts would benefit directly from any allowance made to applicant John H. McNeal for the reason that such finding is not substantiated by facts. It is a fact that J. Fred Potts and John H. McNeal made a joint application for fees. It is an obvious deduction that should J. Fred Potts be denied a fee by virtue of some act over which he alone had control, that any fee allowed John H. McNeal under those circumstances, would be his and his alone. In this connection we wish to call the Court's attention to the following statement of the Special Master, to-wit:

"While it does not appear that McNeal participated in the sale of stock or that his conduct was in any way subject to criticism, the records show that he was associated with Potts in a representation of Potts and Boag and their Committee, so Potts testified. Also the application contains other affidavits under Sec. 62 D of the Bankruptcy Act in which each denies that an agreement or understanding exists between them for the division of compensation."

In the first place, John H. McNeal did not represent "their Committee" as Potts and Boag never filed any papers in these proceedings as a Committee. In the second place, the affidavits of both J. Fred Potts and John H. McNeal recite that an agreement does exist between them for a division of any compensation received by virtue of this joint application. Apparently, the Special Master was too busy reading the recommendations of SEC to effectively pursue the affidavits of applicants Potts and McNeal.

EXCEPTION 5.

In connection with Exception 5, we respectfully refer the court to the accomplishments above set forth which took place between September 27, 1940 and the final approval of the plan by this court on July 2, 1941. A cursory look at those results will, in our opinion, cause the court to agree with us that the Special Master erred in finding that applicant J. Fred Potts regarded this stock as giving him a bargaining position and that his whole effort was to realize on this position. There was not one word of evidence or testimony before the Special Master which would justify such a finding.

EXCEPTION 6.

The Special Master made a finding that this application for fees appears as the effort of J. Fred Potts because applicant John H. McNeal never made an appearance at the hearings before the Special Master. What difference does that fact make? We have read the Special Master's report very carefully and find no such complaints in a number of cases where time was claimed for work done by numerous partners of various law firms who never appeared before the Special Master in these proceedings. We do not understand why this complaint was made in our case inasmuch as the debtor would have been asked to pay for the time of two attorneys instead of one had Mr. McNeal accompanied Mr. Potts on the occasion of all court hearings. We would think that this is another matter where praise should be forthcoming instead of condemnation.

This court is well aware of the intended purposes of Sec. 249. By no stretch of the imagination was the sale of said stock in the instant case a violation of the intent

and meaning of Sec. 249 nor was it in any manner, shape or form, the type of act or transfer which the legislators meant to prevent when said section was incorporated in the Bankruptcy Act. If the sale of this stock by Potts, who had bare legal title, was a violation of Sec. 249, then the acquisition of the bare legal title in 1938 was also a violation.

We respectfully submit that neither the acquisition nor the sale of said stock was a violation of Sec. 249 and Potts should not be deprived of a well earned fee. In any event, to deny McNeal fair compensation for the legal services he rendered in these proceedings would be a gross injustice and reversible error.

Respectfully submitted,

J. F. POTTS AND JOHN H. MCNEAL,
502 Auditorium Building,
Ma. 1926,

Attorneys for Applicants.

YOUNG EXHIBIT 23.

Objections and Exceptions of Potts to Report of Special Master Recommending Denial of Application for Approval of Sale of Stock, and Brief in Support.

(Case No. 26,119, U. S. D. C., N. D. O.—caption omitted.)

To the Honorable, the Judges of the District Court of the United States, for the Northern District of Ohio, Eastern Division:

Now comes J. Fred Potts, applicant herein, and respectfully objects and excepts to the report of the Hon. Wm. B. Woods, Special Master, recommending that the application of said J. Fred Potts for approval of sale of stock of debtor after confirmation, be denied and that said application be dismissed on the grounds and for the reasons that the Special Master erred as hereinafter set forth.

EXCEPTION 1.

The Special Master erred in refusing to allow J. Fred Potts to withdraw his application for the approval of sale of stock of debtor after confirmation upon request for said withdrawal made in open court.

EXCEPTION 2.

The Special Master erred in finding that the "Supplemental and Amended Statement of J. Fred Potts, pursuant to Sec. 249 of the Bankruptcy Act as Amended," contradicted a former statement filed herein so as to give no merit to either statement.

EXCEPTION 3.

The Special Master erred in recommending the denial and dismissal of said application.

Respectfully submitted,

J. F. POTTS AND JOHN H. McNEAL,

502 Auditorium Building,

Ma. 1926,

Attorneys for Applicant.

BRIEF,

About the time applicant filed his petition herein for allowance of compensation, he filed an "Application for the Approval of Sale of Stock of Debtor after Confirmation." In connection with his petition for compensation, applicant filed the following sworn statement as required by Sec. 249:

"J. Fred Potts being first duly sworn deposes and says that he is one of the petitioners in, and this statement is filed in connection with, the petition for the allowance of compensation in the above entitled proceedings, to deponent and John H. McNeal, the petitioners, as attorneys and counsel for First Preferred Stockholders, J. Fred Potts and William W. Boag;

That this statement is made in compliance with the provisions of Section 249 of the Bankruptcy Act as amended (U. S. Code Title II, Sec. 649);

That deponent has not at any time owned, acquired or transferred any claims against or stock of the debtor or any beneficial interest therein, and that no claims against or stock of the debtor have been acquired or transferred for the account of deponent after the commencement of the proceedings herein except the 250 shares of First Preferred Stock which these proceedings show deponent to be the owner of and which shares of stock deponent sold after the confirmation of the plan, to-wit: on or about March 7, 1942.

Further deponent sayeth not."

When this statement was made, careful consideration had not been given the language of Sec. 249. However, there is nothing in the statement which is not a fact. Deponent in that statement said he had sold the 250 shares of First Preferred Stock of Higbee which these proceedings show said deponent to be the owner thereof and said statement was made with the firm conviction that this Court would approve said transfer when in possession of all the facts.

Shortly after the hearings on allowances began, Special Master expressed some doubt as to whether or not an allowance of compensation could be made to this applicant and his associate John H. McNeal, under the existing facts and circumstances in view of the decision laid down by the District Court of the United States for the District of Massachusetts in the case of *Otis & Company vs. Insurance Building Corporation*. The Special Master and counsel for SEC took the position that this Court under Sec. 249 has no discretionary power to approve any transfer of securities of the debtor other than those which might be made by a bequest or intestacy, and that any approval by this Court of any other type of transfer would be for naught.

After a careful study of Sec. 249 and after the power of this Court to approve the above mentioned sale had been challenged by virtue of the decision rendered in the *Otis & Company* case, the following Supplemental and Amended Statement was filed in this Court by this applicant:

"J. Fred Potts being first duly sworn deposes and says that he is one of the petitioners in, and this statement is filed in connection with, the petition for the

allowance of compensation in the above entitled proceedings, to deponent and John H. McNeal, the petitioners, as attorneys and counsel for First Preferred Stockholders, J. Fred Potts and William W. Boag.

That this statement is made in compliance with the provisions of Section 249 of the Bankruptcy Act as amended, (U. S. Code, Title II, Sec. 649).

That no claims against or stock of the debtor, in which he had a beneficial interest, direct or indirect, and no beneficial interest, direct or indirect, in any claim against or stock of the debtor, has been acquired or transferred by him, or for his account, after the commencement of these proceedings.

Further deponent sayeth not."

This statement more fully sets forth all of the facts of the transactions of the instant case and brought to the Special Master's attention facts which had been revealed before him late in 1938, and said statement showed conclusively that Sec. 249 had no application to the instant set of facts.

After filing said Supplemental and Amended Statement, applicant requested that he be allowed to withdraw his "Application for the Approval of Sale of Stock of Debtor after Confirmation" with the right to file an amended application for the approval of said sale, in the event of an adverse finding in connection with applicant's petition for compensation. This request was denied by the Special Master.

In the case of *Otis & Company vs. The Insurance Building Corporation, et al.*, 110 Fed. (2d) 333 counsel for SEC took the position that the Court was without power under the provisions of Sec. 249 to approve any purchases and/or sales whatsoever. The Special Master disagreed with counsel for SEC on that point and made an allowance to Otis & Company. The District Judge overruled the Special Master and had the following to say in so doing:

"As I interpret that Section it is an absolute prohibition against the allowance of compensation to those acting in a fiduciary capacity who have during the pendency of the reorganization purchased or sold claims or stock of the debtor. The Section further

goes on to somewhat limit the prohibition in cases where stock has been 'otherwise acquired or transferred.' This, I interpret to mean, applies to transactions other than sales or purchases. I therefore rule that the application of Otis & Company for fees must be denied on the authority of Section 249." (memorandum, dated October 31, 1939, p. 1.)

He added, however,

"If an appellate court adopts the interpretation urged by the applicant, namely, that dealing in stock, whether by purchase, sale or otherwise, is not a bar to the awarding of compensation where the court's approval has been subsequently obtained, then a very different result will be had. The type of transaction entered into by Otis & Company has been such as to show clearly that it has not violated a duty owed to the debtor or its bondholders, nor has there been any question of bad faith on its part. If, then, the matter is one addressed to the discretion of this Court, I would approve the Master's recommendation as stated in his Report." (Memorandum, dated October 31, 1939, p. 2.)

An appeal was taken from the court's findings, but the case was settled before any hearing in the District Court of Appeals.

The legislative history of Sec. 249 established that authority to approve purchases and sales was conferred upon the District Judge.

It is a well-established rule of Statutory interpretation that if the meaning of legislation is uncertain, the history of the legislation may properly be considered and that a valuable aid to construction is the statement of the purpose of such legislation set forth in the report of the Committee recommending its adoption. As stated in *U. S. v. Great Northern Railway*, 287 U. S. 144, 154, 155 (1932):

"In aid of the process of construction we are at liberty, if the meaning be uncertain, to have recourse to the legislative history of the measure and the statements by those in charge of it during its consideration by the Congress."

So also in *Binn v. United States*, 194 U. S. 486 (1904), the court said:

“While it is generally true that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body * * * yet it is also true that we have examined the reports of the committees of either body with a view of determining the scope of statutes passed on the strength of such reports.” (P. 495.)

Numerous decisions show resort to committee reports for aid in construction of legislation. See for example:

United States v. Coca Cola Co., 241 U. S. 265, 281 (1916);

New York Central R. R. Co. v. Winfield, 224 U. S. 147, 150 (1917);

Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 162, 163 (1920);

Duplex Printing Press Co. v. Deering, 254 U. S. 443, 475 (1921);

Tagg Bros. and Moorhead v. United States, 280 U. S. 420, 435 (1930);

Humphrey's Executor v. United States, 295 U. S. 602, 624 (1935).

The history of Chapter X and particularly the Committee Report recommending its adoption unequivocally confirm the conclusion that the District Judge in the exercise of his judicial discretion may approve purchases and sales. The original draft of Section 249 contained no clause authorizing approval of any acquisitions or transfer. Amendments were suggested to the Subcommittee of the Committee on the Judiciary of the Senate, at hearings on the legislation. (See Senate Hearings on H. R. 8046 (1938) at pp. 124-125.) Whatever may have been the intention of the persons who made to the Subcommittee suggestions for change in the original draft, the intention of the Senate Committee on the Judiciary, which adopted that section in its present form and recommended it to Congress is clear. The Committee on the Judiciary in its Report to the Senate (Report No. 1916; Calendar No. 2022; 75th Congress 3d Session) submitting the Chandler Act with Section 249 in its present form unequivocally stated that un-

der said section the judge might approve purchases and sales. That Committee said with respect to Section 249:

"Denial of Allowances for Breach of Duty.—(Sec. 249, p. 169).—This section of the House Bill denies any compensation out of the estate to persons who violate their representative or fiduciary capacity by buying or selling claims or stock of the debtor during the proceedings. To prevent hardship in the unusual case where an exception to this rule might be equitable, the committee has added a clause giving the judge power to approve or consent to an acquisition or transfer in such exceptional case." p. 7. (This portion of the report was read to the House of Representatives by Congressman Chandler in charge of the bill in the House. See 83 Congressional Rec., Pt. 8, 75th Cong., 3rd Sess. p. 9108. The House concurred in the Senate Amendments.)

and in its sectional analysis of Chapter X that Committee said:

"Sec. 249—forbids the granting of allowances to persons acting in a fiduciary or representative capacity, who deal in securities of the debtor during the pendency of proceedings under this chapter, except as the judge may approve or consent to an acquisition or transfer thereof in an unusual case. This section is in the main a codification of the rule already imposed by the courts in proceedings under Section 77B." p. 38.

The foregoing extracts from the Committee's report serve to eliminate any doubt that might exist that it was the intent of said section to enable the judge to determine whether a purchase or sale ought to bar compensation. Denial of allowance is described as "for breach of duty." No distinction is suggested between the power of the judge with respect to purchases and sales and with respect to other acquisitions and transfers. No intimation is given that the judge's power is limited to acquisitions or transfers by bequest or intestacy. On the contrary, the Committee points out that, in the House Bill, buying or selling was fatal to an allowance while, in the bill submitted to the Senate, this is no longer so; that the judge may approve

of dealing in securities, and that the section submitted is in the main a codification of the rule imposed by the courts in proceedings under Section 77B. A rule that purchases or sales are fatal to an allowance is not a codification, in the main or otherwise, of any rule imposed in Section 77B proceedings. The Section 77B cases do not go beyond a holding that the Courts had discretion to bar compensation for a breach of fiduciary duty and that in the exercise of that discretion they would hold speculative purchases and sales a bar. No Section 77B cases denied compensation in the absence of flagrant breach.

A construction in favor of judicial discretion should always be favored unless the statute cannot otherwise be reasonably construed.

We are convinced that the decision in the *Otis & Company* case was a bad interpretation of the powers given to the District Judge by Sec. 249.

As to whether or not the instant case is an unusual one suffice to say that said sale brought about an immediate actual confirmation of the reorganization of debtor which was desired by this Court, the debtor, all of debtor's creditors and nearly ninety per cent of debtor's stockholders. Further the sale was not made as the result of inside information nor was it violative of any fiduciary relationship.

We therefore urge that in the event this Court finds that applicant had an indirect beneficial interest in the 250 shares of First Preferred Stock of Higbee, (to which he had bare legal title and which was sold by him on March 7, 1942) within the meaning of Sec. 249, applicant be allowed to file an Amended and Supplemental Application for the approval of sale of stock of debtor after confirmation, and that this Court then approve said application.

Respectfully submitted,

J. F. POTTS AND JOHN H. MCNEAL,

502 Auditorium Building,

Ma. 1926.

Attorneys for Applicant.

YOUNG EXHIBIT 24.**Memorandum of Securities and Exchange Commission in Reply to Briefs of Potts and McNeal in Support of Their Objections to Reports of Special Master. on Allowances and Application for Approval of Sale of Stock.**

(Case No. 36,119, U. S. D. C., N. D. O.—caption omitted.)

The Securities and Exchange Commission respectfully submits this memorandum in reply to the brief filed by J. Fred Potts and John H. McNeal in support of their objections to the report of the Special Master on allowances. It is submitted also in reply to the separate brief of J. Fred Potts in support of his objections to the Special Master's report recommending denial of his application for approval of the sale of certain preferred stock of the Debtor.

Briefly stated, the position of the Commission is that the Special Master was correct in finding that Section 249 of the Bankruptcy Act prohibits an allowance of compensation to either Potts or McNeal. McNeal's right to compensation will be discussed separately, however, and as hereafter used the term "applicant" will refer only to Potts.

STATEMENT OF FACTS.

We believe that it will assist the Court if we briefly recapitulate the facts and circumstances which provide the background for the issues presented by the objections which Potts and McNeal have filed to the Master's reports.

As the Master has found, the applicant's participation in the present proceeding began in the summer of 1938 when he became a member of The New Preferred Stockholders' Committee. Prior to this time counsel for that committee had attacked certain claims comprising the so-called junior indebtedness of the Higbee Company, and the committee actively continued its opposition to these claims until a compromise was reached with respect to this controversy and embodied in the plan of reorganization;

After negotiations with the two committees representing preferred stockholders and with the various other parties to this proceeding the debtor submitted its final plan on

September 27, 1940. Shortly thereafter the applicant and William W. Boag resigned from the committee. The facts with respect to the applicant's resignation are in dispute. The applicant has testified in substance that he resigned because of differences which he had with the committee concerning the 1940 plan, several features of which he disapproved. This conflicts with the version of the facts given by Mr. L. A. Bloomfield of counsel for the committee. Mr. Bloomfield testified that "the basic reason that Mr. Potts and Mr. Boag left the preferred stockholders' committee, for which we were counsel, was that both Judge Orr and myself were convinced that Mr. Potts was not representing all the preferred stockholders, and we finally reached the conclusion that Mr. Potts was representing himself."¹ The events which transpired subsequently tend to confirm Mr. Bloomfield's explanation.

Shortly after the applicant and Boag resigned from the committee they filed objections to the 1940 plan. Objections were also filed by various creditor interests and by both committees for preferred stockholders. In addition, this Commission criticized certain features of the plan both in negotiations with the debtor and parties and in its advisory report on the plan. The plan was amended in several respects so as to meet virtually all of the objections of all the parties except the applicant. The plan as so amended was approved by this Court on July 2, 1941. The applicant and Boag continued their opposition to the plan, however, and in a circular letter to preferred stockholders dated July 10, 1941 advised such stockholders that a new committee had been formed "solely for the benefit of the Preferred Stockholders of The Higbee Company, and to prosecute certain objections to the Amended Plan of Reorganization dated September 27, 1940, filed for The Higbee Company."² This letter referred to the applicant and Boag as "owners of 250 shares and 10 shares of First Preferred Stock, respectively."³ Applicant has testified that he received responses from some of the preferred stock-

¹ Transcript of hearing on allowances, p. 258.

² Potts' Exhibit 2.

³ Ibid.

holders who expressed "a desire that the objections be prosecuted."⁴

The plan was confirmed over applicant's objections on October 17, 1941. Applicant and Boag filed a notice of appeal dated November 14, 1941 as "owners of 250 shares and 10 shares of First Preferred Stock of the Higbee Company, respectively."

From the strictly personal point of view of applicant and Boag the appeal proved extremely successful. As a result of circumstances in no way related to its merits the appeal suddenly acquired a substantial nuisance value. As applicant somewhat cryptically puts it, "there was a desire to end this litigation." Applicant and Boag, who had previously advertised themselves as "a committee organized solely for the benefit of the Preferred Stockholders," capitalized personally on the sudden importance which their appeal had acquired by having it dismissed pursuant to an arrangement with Messrs. Charles L. Bradley and John P. Murphy under which applicant and Boag sold their first preferred stock (260 shares, of which applicant held legal title to 250 shares) for \$115,000. This stock had a par value of \$26,000 and its then market value was less than \$17,000.⁵ In view of applicant's testimony that he did not consider the excess consideration received for his stock as compensation for any services rendered by him in this proceeding the most polite designation of this excess would be to describe it as a recovery realized in the course of a settlement of the appeal. It was a recovery, however, in which the preferred stockholders (including those who responded to applicant's appeal for support) have not shared, although they obviously would have shared in any benefits which might have accrued if the appeal had been prosecuted to a successful conclusion.

Despite the complete abandonment of his opposition to the Higbee Plan on the basis described above, applicant apparently felt that he and his most recent associate, Mr. McNeal, should be compensated out of the estate for improvements in the plan alleged to have resulted from their opposition. Accordingly, the applicant and McNeal filed

⁴ Transcript, p. 228.

⁵ Transcript, p. 232.

a petition in the present proceeding for an allowance in the amount of \$45,000, i.e., compensation at the rate of approximately \$65 per hour for the time reported spent.

In the mistaken belief that the provision of the Bankruptcy Act prohibiting compensation to attorneys or fiduciaries who have sold securities of a debtor during the proceeding would not apply if he obtained court approval of the sale of his stock applicant filed an application with this Court requesting approval of such sale "in order that said sale as a stockholder will not in and of itself deprive applicant as an attorney of the right to receive a fair and reasonable fee for his services under Section 249 of the Bankruptcy Law of the United States." The application was referred to the Special Master. In this application applicant referred to Boag and himself as "owners" of the stock sold. In a sworn affidavit annexed to the petition for an allowance the applicant admitted that he had sold "250 shares of First Preferred Stock which these proceedings show deponent to be the owner of."

After filing the above petition for compensation and application for approval of the sale applicant gave further study to the language of Section 249 of the Bankruptcy Act, and apparently also considered [redacted] provision of the Circuit Court of Appeals for the First Circuit in the case of *Otis & Company v. Insurance Building Corporation*,⁶ discussed later in this memorandum. As a result of this investigation the applicant determined to abandon the procedure previously adopted for avoiding the operation of Section 249 and decided to urge the point that he had no beneficial interest in the stock sold. He thereupon sought leave to amend his affidavit so as to deny having any beneficial interest in the stock sold, and also to withdraw his application for approval of the sale. In this connection he urged that he had held only the bare legal title to the stock, beneficial ownership being in his wife.

In addition to recommending denial of compensation to Potts and McNeal in his general report on allowances the Master has filed a separate report recommending that the above application for approval of the sale of stock be denied. In view of the applicant's previous attempt or

⁶ Transcript pp. 209, 257.

offer to withdraw this application and the reasons which he gave for such action it is somewhat surprising that he now objects to the recommended denial of the application. Presumably his original faith in the efficacy of judicial approval of the sale to remove the prohibition of Section 249 has been revived, however, and he now urges that the sale be approved for that purpose, although this point was not urged in the brief which he filed with the Special Master. Accordingly, the issues now presented are (1) whether judicial approval of the sale would operate to remove the prohibition of Section 249, (2) whether Potts had an interest in the stock which was sold and (3) whether Section 249 bars an allowance of compensation to McNeal.

ARGUMENT.

(Argument of law re applicability of Section 249 of the Bankruptcy Act omitted.)

Respectfully submitted,

WILLIAM R. SHERWOOD,

RICHARD B. AINSWORTH,

*Attorneys for the
Securities and Exchange Commission.*

YOUNG EXHIBIT 25.

Memorandum of Judge Jones on Report of Special Master on Application for Approval of Stock Sale and on Allowances of Compensation (September 3, 1942).

(Case No. 36,119, U. S. D. C., N. D. O.—caption omitted.)

JONES, J.:

Consideration has been given to the question of whether the Court, under the facts presented, now should approve the settlement sale of the Potts-Boag first preferred stock in order to make the sellers eligible to apply for compensation for legal services alleged to have been performed in the interest of the reorganization. It seems so clear to the Court on the facts that this should not be done as to require no citation of authority. All preferred

shareholders accepted the plan of reorganization, after amendment in several respects, except these applicants, and the plan as amended was approved by the Court on July 2, 1941. The applicants strenuously opposed the approval of the plan, as amended, and continued their opposition to it by subsequently circularizing preferred stockholders and by taking an appeal from the order of confirmation. While their appeal was pending, Potts sold his 250 preferred shares to Bradley and Murphy for \$95,000.00 and Boag sold his 10 shares to the same persons for \$20,000.00. These 260 shares of stock so sold had a par value of \$26,000.00 and a then market value of approximately \$17,000.00. Pursuant to this sale and arrangement, the appeal was dismissed on March 11, 1942.

There is no justifiable basis in these circumstances upon which the Court could bottom its approval of the settlement sale of this stock, nor does there appear any just reason for allowing compensation to these applicants upon the theory that they performed services beneficial to the estate or in furtherance of the reorganization. The plain fact is that no such additional burden should be imposed upon the debtor and its creditors and shareholders who accepted the plan, and this is so independently of the prohibition of Section 249 of the Bankruptcy Act. The clear purpose and implications of that provision are sufficient to support rejection, but the bankruptcy court's powers, quite aside from that section are adequate to deny any such approval or allowance. I think that the Master's report and the brief of the Securities and Exchange Commission fully and adequately respond to the application for approval of the settlement sale, as well as to the application for compensation. Nothing is to be gained by a restatement of the ground for denial of both applications. Upon the conceded facts, I can find no ground upon which to sustain the exceptions to the Master's report, and they are accordingly denied and the report confirmed.

Careful consideration also has been given to the Master's recommendations for allowance of compensation to the six or seven applicants participating in the reorganization proceedings. The reorganization began in August of 1935, under then Section 77B of the Bankruptcy Act. Considerable delay resulted from the necessity of liquidat-

ing or terminating the so-called "North" claim and from the litigation concerning the Refunding and Rental Agreement. Complications which caused further delay arose out of the controversy in respect of the ownership of the so-called "Junior Indebtedness." The plan of reorganization finally was confirmed in October, 1941. In spite of the delays and complications, the reorganization and the financial status of the debtor seem to be favorable to successful continuance of the business. This result and the financial condition of the debtor, as reported by the Master, would seem to justify adequate but reasonable compensation to those who contributed to the successful outcome.

The Master has reported upon the conflict of interest question raised by exceptions of a preferred stockholder in respect of the allowance of compensation to attorneys for the debtor. This question in part previously was brought to the attention of the Court in an earlier hearing where an application was made to appoint special counsel in the place of attorneys for the debtor, upon the ground of conflict of interest. Consideration has been given to the exceptions filed on this point, but the Court finds no evidence of conflict of interest of such character as to justify disallowance of compensation to attorneys for the debtor.

The period over which the services were performed, in the case of the debtor's attorneys, was nearly seven years. Others performed services for a stockholders' committee for substantially a like period and some performed services over a period of from four to five years. When the whole proceeding is considered with its tedious delays and complicated controverted questions, and the successful results are fairly appraised, I find myself unable to conclude that the allowances recommended by the Master are not within reasonable limits. Accordingly, his report on allowances will be confirmed and the allowances made as recommended.

(signed) JONES,

United States District Judge.

September 3, 1942.

Filed September 3, 1942.

C. B. WATKINS,

Clerk, U. S. District Court, N. D. O.

YOUNG EXHIBIT 26.**Agreement of March 7, 1942, for Sale of Stock to
Bradley and Murphy.**

In compliance with oral contract made over the telephone on March 3rd, 1942 and in consideration of the sum of One Hundred *Fifteen* Thousand Dollars (~~\$100,000~~ 115,000.00), payable *Twenty* Five Thousand Dollars (~~\$5,000.00~~ \$25,000.00) cash on execution hereof, the receipt whereof is hereby acknowledged, and the balance payable on delivery of the stock, such balance to be paid either in cash or in such other manner as shall be acceptable to the undersigned, J. Fred Potts, said stock to be delivered not later than ~~Friday~~ *Saturday*, March ~~6th~~ *7th*, 1942, I hereby sell, assign, transfer and set over unto Charles L. Bradley and John P. Murphy, and their assigns, 260 shares of First Preferred stock of The Higbee Company, of Cleveland, Ohio, 250 of which said shares are owned by me and 10 shares are owned by William W. Boag, whose attorney I am with full power to act on his behalf, together with all rights, title and interest, benefits or privileges we, or either of us, have or may have in and to or by virtue of or arising from the matter of The Higbee Company, Debtor, J. Fred Potts and William W. Boag, Appellants, vs. The Higbee Company, Appellee, and a certain appeal taken by J. Fred Potts and William W. Boag in said proceedings, which said appeal is now pending in the United States Circuit Court of Appeals for the Sixth Circuit, and being cause No. 9148 in said Court, it being hereby represented that the shares hereby sold are the subject matter involved in said appeal; that no one is interested in said appeal except the undersigned J. Fred Potts and said William W. Boag, and that said appeal was brought solely on behalf of said Potts and Boag and not as the representatives of a class, and do hereby further consent that said appeal may be dismissed at the costs of the appellants, ~~the costs thereof, however, to be paid by said Charles L. Bradley and John P. Murphy,~~ and I do further hereby agree to execute any and all papers, documents and paper writing necessary in the premises or re-

quested and to do any and all things necessary to effectuate the sale of said stock and the dismissal of said appeal.

J. F. Potts,

J. F. Potts,

Attorney for William W. Boag.

Approved

William W. Boag

*Interlineations initialed by J. F. Potts and witnessed
by L. C. Wykoff*

FINAL DECREE OF DISCHARGE.

(Filed December 1, 1942.)

This cause having come on to be heard upon the application of the Debtor for a discharge from these proceedings and the Ad Interim Report of the Special Master in that regard, the Court being fully advised in the premises finds:

(a) That notice of the hearing upon said application was given in the manner, to the parties and within the time prescribed by law and the previous orders of the Court; and

(b) That the Amended Plan of Reorganization of the Debtor finally confirmed on March 12, 1942, has now been fully consummated.

It is therefore ORDERED, ADJUDGED AND DECREED:

1. That the order entered by the Special Master November 19, 1942, amending paragraph 9 of the order of this Court entered June 3, 1942, to provide that the note attached as Exhibit I to the application of the Debtor filed with the Special Master on May 8, 1942, shall be payable to the order of The Cleveland Trust Company, Successor Trustee under First Mortgage Deed of Trust dated March 1, 1931, from The Cleveland Terminals Building Company to the Guardian Trust Company, Trustee, recorded in Volume 3995, page 358, of Cuyahoga County, Ohio, records of mortgages, be and it is hereby approved and adopted as the order of this Court and that all orders heretofore entered by Wm. B. Woods, Special Master herein, which have not heretofore been approved or modified by this Court, be and they are hereby approved and adopted as orders of this Court, except such as pertain to the matters in which jurisdiction is retained, as set forth in paragraph V of this order;

II. That the Debtor be and it hereby is discharged from all its debts and liabilities dealt with and considered in its Amended Plan of Reorganization finally confirmed March 12, 1942, and that all rights and interests of its stockholders be and they hereby are terminated, except as provided in said Amended Plan of Reorganization;

III. That the holders of securities affected by said Amended Plan of Reorganization shall present or sur-

render their securities within five years from the date hereof. After such time no such claim or stock shall participate in the distribution under said Amended Plan of Reorganization. The securities or cash remaining unclaimed at the expiration of such time shall become the property of the Debtor, free and clear of any and all claims and interests;

IV. That the Debtor be and it hereby is discharged and the estate of the Debtor be and it hereby is closed, except only as to matters in respect to which jurisdiction is retained by this Court; and

V. That this Court hereby retains jurisdiction of the proceedings in this cause solely for the purpose of hearing and determining the following matters:

(a) The litigation now pending in these proceedings and in respect of which the Special Master has heretofore filed his Ad Interim Report, and which will determine the ownership of the new note and the new common stock of the Debtor applicable to its so-called Junior Indebtedness and the proceeds of the participation in the Senior Bank Indebtedness of the Debtor held by J. P. Morgan & Company, New York City, applicable to the owner of the Junior Indebtedness, pursuant to paragraph 7 of the order entered herein by the Special Master on April 18, 1942, together with any and all matters relating to said new note, said new common stock and said participation in said proceeds, including the escrow with The Cleveland Trust Company established by order entered on August 21, 1942, but nothing herein contained shall constitute a confirmation or modification of said Ad Interim Report, jurisdiction to pass upon the same being hereby expressly reserved;

(b) The amended application for institution of proceedings filed herein with Wm. B. Woods, Special Master, on November 20, 1942, on behalf of Robert R. Young, together with all questions in connection with said application or which may arise in or as a result of hearings thereon, and any litigation which may be instituted by said Robert R. Young pursuant to any ruling which the Court may make on his said application; and

(c) Any applications which may be filed by counsel for the Debtor or other counsel for services in consumma-

tion of the Amended Plan of Reorganization finally confirmed March 12, 1942.

The reference heretofore made to Wm. B. Woods, Special Master in these proceedings, shall continue as to the matters hereinbefore set forth in respect to which jurisdiction is retained.

PAUL JONES,

United States District Judge.

Approved:

Entered: December 1, 1942:

APPROVED AND RECOMMENDED:

12-1-42

WM. B. WOODS, *Special Master.*

APPROVED:

JONES, DAY, COCKLEY & REAVIE,

Counsel for the Debtor.

BUSHNELL, BURGESS & FULTON,

Counsel for Metropolitan Life Insurance Company.

I. WALTER SHARP,

Counsel for The Cleveland Terminals Building Co.

BLOOMFIELD & ORR,

Counsel for New Committee of Preferred Stockholders.

M. B. & H. H. JOHNSON,

Counsel for Preferred Stockholders' Protective Committee.

BAKER, HOSTETLER & PATTERSON,

Counsel for J. P. Morgan & Co., The Cleveland Trust Company and The Midland Bank.

HARRY A. HANNA,

Counsel for W. L. Hart, Superintendent of Banks of the State of Ohio, in Charge of the Liquidation of the Guardian Trust Company, Cleveland, Ohio.

EWING & HECKER,

Counsel for Stockholders.

J. FRED POTTS & JOHN H. McNEAL,

ROBERT W. PURCELL,

Counsel for Robert R. Young.

McKEEHAN, MERRICK, ARTER & STEWART,

Counsel for C. L. Bradley and John P. Murphy.

ROBERT J. BULKLEY AND JAMES A. BUTLER,

Counsel for Robert R. Young and Allan P. Kirby.

SAMUEL SPRING,

Counsel for Frank F. Kolbe.

CUMMINGS, MOOK, STRONG & DOUGLAS,

Counsel for The Cleveland Trust Company, Depositary.

MOONEY, HAHN, LOESER, KEOUGH & FREEDHEIM,

Counsel for The National City Bank.

**AD INTERIM REPORT OF SPECIAL MASTER ON
AMENDED APPLICATION OF ROBERT R. YOUNG
FOR INSTITUTION OF PROCEEDINGS.**

(Filed March 24, 1943.)

*To the Honorable Judges of the District Court of the
United States, for the Northern District of Ohio, East-
ern Division:*

Now comes the undersigned, heretofore appointed in these proceedings as Special Master, and reports to the Court that pursuant to the order heretofore entered by the Court on August 8, 1935, approving the petition of the Debtor, authorizing the Debtor to continue temporarily in possession and to operate until further order of the Court, and referring to the undersigned for consideration and re-

port all matters and things thereafter arising in these proceedings, and directing the undersigned to conduct such hearings for that purpose and in the manner provided in Section 77B of the Acts of Congress relating to bankruptcy, as amended, now files this his Ad Interim Report in said proceedings.

THE CONTROVERSY.

The amended application of Robert R. Young for institution of proceedings filed herein prays that an order be entered either (a) authorizing him to employ counsel on behalf of The Higbee Company to institute proceedings against J. F. Potts, William W. Boag, C. L. Bradley, J. P. Murphy and any other party who may be liable, to compel an accounting and payment over to The Higbee Company of a sum equal to the difference of the fair value of the Preferred Stock which was sold by Potts and Boag to Bradley and Murphy for \$115,000, the full purchase price of said stock or, (b) directing the same individuals to pay to the First Preferred Stockholders of The Higbee Company the difference between the fair value of said Preferred Stock sold by Potts and Boag to Bradley and Murphy, and said sum of \$115,000.

STATEMENT OF FACTS.

Starting with negotiations in January of 1937, in June of that year Bradley and Murphy bought from the Ball Foundation the so-called Junior Debt of The Higbee Company amounting to \$1,551,051.66 for \$600,000 and then filed their claim against The Higbee Company. The Plan of Reorganization of this Debtor provided, as a result of negotiations, that the owners of the Junior Debt should receive a new note of The Higbee Company for \$600,000 and approximately one-half of the Common Stock of the reorganized company, the question of ownership being left open for determination after final confirmation of the Plan of Reorganization.

J. F. Potts and William W. Boag were members of a committee known as the New Preferred Stockholders Committee from 1938 until in November 1940 when they resigned from the committee because they did not approve the treatment of the Junior Debt and the First Preferred

Stockholders as provided in the Plan of Reorganization filed in September 1940. Thereafter, as individuals, they objected to this part of the Plan of Reorganization and invited counsel for Young to join with them, which counsel refused to do, but did cooperate in the preparation of their objections (R. 29*).² Potts and Boag circularized the First Preferred Stockholders in an effort to organize a new committee without results (Young D. 19, pp. 227-8) and when their objections were denied by the District Court Potts and Boag appealed to the U. S. Court of Appeals of the Sixth Circuit, again acting on behalf of themselves only (Young Ex. 16).

About this time, on May 28, 1941, Young and Kirby brought suit against Bradley and Murphy to get for themselves the Junior Debt which Bradley and Murphy had bought from the Ball Foundation (R. 29). Young's counsel told Potts that he was no longer interested in their objections because he now wanted Bradley and Murphy to get as much as they could of the Junior Debt so that there would be that much more for Young to try to take away from them.

At the same time counsel for Young agreed not to oppose confirmation of the Plan of Reorganization if his application for leave to file proof of claim was granted (R. 41) and the hearing on the ownership of the claim was had after the Plan was confirmed. The Master's report was filed in September 1942 recommending finding of ownership in Bradley and Murphy and dismissing the applications of Young, *et al.*, which was affirmed by His Honor Judge Jones in an order entered on March 16, 1943. Only when Young acquired the Bradley-Murphy note, which he immediately declared due and payable (R. 37), did the Potts and Boag objection become of importance, for it had been denied by the Master and the District Court and their appeal was generally considered without merit.

In March of 1942 Young, through litigation which he had instituted against the Ball Foundation, succeeded in getting possession of the Bradley-Murphy note (R. 49). On the next day he declared the note due, and served notice

* The references in this Report to the pages of the Typewritten Transcript of the Proceedings before the Special Master have been conformed to the pages of this Printed Record.

on Bradley and Murphy that he would sell the collateral within a few days (R. 50). Then for the first time did the Potts and Boag appeal acquire a nuisance value, for obviously the avails of the reorganization plan were ample to finance the payment of the Bradley and Murphy note and prevent the Young effort to squeeze them out. But the fruits of the Plan of Reorganization could not come into being until the Plan was finally confirmed and this could not occur so long as the Potts and Boag appeal was pending.

Bradley and Murphy communicated with Potts who was then in California by telephone and were given a price of \$100,000 for the Potts and Boag stock (R. 30). Their lawyer met Potts in Chicago (R. 31) and after Potts talked with Boag by telephone it was understood that he had been willing to sell for a proportionate share of the total price of \$100,000 (R. 31-34). However, the next day Boag conferred with Purcell, Young's attorney, in Cleveland (R. 32) and his price for the ten shares was increased and Boag told Potts of his conversation with Purcell about the worth of his services and what they would pay in a new note of The Higbee Company for his stock (R. 34). The testimony is that Purcell told Potts that they would meet any offer made by Bradley and Murphy for the stock (R. 32) but when he conferred with Young, the client, report was made to Potts that Young was no longer interested in the purchase but that he was going to try to intervene and stop the appeal being dismissed (R. 38). Thereupon Boag agreed to sell and received \$20,000 for ten shares and Potts \$95,000 for 250 shares.

Thereafter Young sought to intervene in the Court of Appeals and opposed the dismissal of the appeal (Bradley and Murphy Exs. 1, 3, 6, 7). Young claimed before the Court of Appeals that Potts and Boag were acting in behalf of all Preferred Stockholders, including himself (Bradley and Murphy Exs. 3 and 7). Potts and Boag and their successors in interest, Bradley and Murphy, claimed they were acting only on behalf of themselves (Bradley and Murphy Exs. 2 and 4).

Potts and Boag told the court that they were acting for themselves after they resigned from the Preferred Stockholders Committee (Young Ex. 18, p. 263). Each

document filed by them after their resignation shows on its face that it was filed by Potts and Boag as the owners of 250 shares and 10 shares, respectively. Potts and Boag had tried unsuccessfully, by circularizing the other stockholders, to organize another New Preferred Stockholders Committee (Young Ex. 19, pp. 227 and 228), only to find that "all the stockholders excepting Boag had deserted me" (R. 47). Young's lawyer admits that he knew this (R. 47). By the instrument by which Potts and Boag sold their stock to Bradley and Murphy (Young Ex. 26) they expressly represented that "the shares hereby sold are the subject matter involved in said appeal; that no one is interested in said appeal except the undersigned, J. Fred Potts, and said William W. Boag, and that said appeal was brought solely on behalf of Potts and Boag and not as the representatives of a class."

The Circuit Court of Appeals found that the appeal was not taken in a representative capacity, and denied the application of Young to intervene (Bradley and Murphy Exs. 8 and 9).

These are the facts upon which Robert R. Young, whose right was denied by the Circuit Court of Appeals, now asks that this court order (a) Bradley and Murphy to pay over to The Higbee Company the difference between the fair value of the stock bought by them from Potts and Boag and the price paid therefor, or (b) to pay to the First Preferred Stockholders of The Higbee Company an equal sum of money.

MEMORANDUM

The relief sought by Robert R. Young in his amended application for institution of proceedings is for either (a) an order requiring Potts and Boag in the first instance and Bradley and Murphy secondarily to pay over to The Higbee Company the difference between the fair value of the Potts and Boag stock and the price paid therefor, or (b) an order requiring them to account for the same sum of money to all the holders of First Preferred Stock.

The Amended Plan of Reorganization of the Debtor was finally confirmed on March 12, 1942 and the final decree of discharge was entered by the District Court on December 1, 1942. In this decree the court retained juris-

diction of certain pending proceedings for the purpose of hearing and disposing of them, which included this amended application in the following language:

"The amended application for institution of proceedings filed herein with Wm. B. Woods, Special Master, on November 20, 1942, on behalf of Robert R. Young, together with all questions in connection with said application or which may arise in or as a result of hearings thereon, and any litigation which may be instituted by said Robert R. Young pursuant to any ruling which the Court may make on his said application."

By Sections 206 and 209 of the Bankruptcy Act, Chapter 10, a stockholder acting individually and without representing other stockholders or the company, has a right to be heard on all matters arising in the reorganization proceedings and any stockholder may act in person, by attorney, by agent or by committee. So Potts and Boag had the right as individuals to be heard on the confirmation of the Plan of Reorganization of this Debtor. In the proceeding they did not claim they were acting for anyone but themselves. While the proof shows they sought to form a committee and sought help from others, the evidence fails to disclose that they were ever authorized to act for any other person and were acting solely on their own behalf. The appeal was filed and notice given "that J. Fred Potts and William W. Boag, owners of 250 shares and 10 shares of First Preferred Stock of The Higbee Company, respectively, the appellants above named, hereby appeal * * *."

RIGHT OF POTTS AND BOAG TO DISMISS THEIR APPEAL.

After Bradley and Murphy had purchased the Potts and Boag stock, the stipulation was filed providing for the dismissal of the appeal and before this was ruled upon, Young, as the holder of First Preferred Stock of Debtor, filed his application to intervene, objecting to the dismissal of the appeal and sought to continue its prosecution. The Young application in the Court of Appeals made the same claims as made here, and after hearing the Court of Appeals overruled the Young application to intervene and

dismissed the pending appeal. Ordinarily this would be *res adjudicata*, and sufficient to close the controversy, although the court entry merely dismisses the appeal in a few words (Bradley and Murphy Ex. 9).

This new proceeding instituted by Young and now before the Master on his amended application seems to present the same questions which were decided by the Court of Appeals, i.e. that Potts and Boag were acting for stockholders other than themselves. Young still contends that notwithstanding the Court of Appeals has dismissed the appeal, that Potts and Boag primarily and Bradley and Murphy secondarily must account to The Higbee Company or to the holders of its First Preferred Stock for the difference between the fair value of that stock and the price paid therefor.

If it be assumed for the sake of argument that Potts and Boag were acting in a representative capacity the judgment of the Circuit Court of Appeals seems to be a conclusive adjudication that Potts and Boag had the right as a matter of law to settle and dismiss their appeal without accounting for the benefits of that settlement. The rule seems to be that if a stockholder acting in the interest of someone other than himself, asserting a right on behalf of other stockholders, he nevertheless has the right, until someone else should successfully intervene, to dismiss the appeal upon terms which are satisfactory to him, in which event he is under no obligation to account to others for the consideration received in the settlement.

A leading case is *May v. Midwest Refining Co.*, 141 F. (2d) 431 (C. C. 1, 1941) where a plaintiff as a stockholder brought an action claiming that the directors of the corporation had wrongfully sold the assets to a company which owned the majority of the stock of the corporation and asked for an accounting and damages. Woodbury, Circuit Judge, said at p. 439:

"While it is true that the plaintiff's suit is derivative, and while it is true that it is also representative in that other stockholders similarly situated are entitled to share in the proceeds thereof (for this reason relief in suits of this sort ordinarily, although not universally, * * *, runs to the corporation in whose behalf suit is brought) it is also true that *every* suit in a derivative

capacity necessarily includes a suit in an individual capacity as well.' *Col. Law Rev.*, *supra*. Thus the plaintiff is acting a dual role. He is suing on behalf of his corporation to redress a wrong allegedly done to it, and he is also suing in his own right as a stockholder to redress a wrong which he alleges that he, himself, has sustained by reason of his stock ownership. In the latter role he 'may continue, compromise, abandon or discontinue it (the suit) at his pleasure until a stockholder similarly situated has procured an order to be made a party.' 3 *Cook on Corporations*, 8th Ed. Sec. 748, cited with approval in *Johnson v. King-Richardson Co.*, 1 Cir., 36 F. (2d) 675, 67 A. L. R. 1465. See, also, 41 *Col. Law Rev.*, *supra*. But no other stockholder has sought to intervene, if there are any still in a position to do so, and thus the plaintiff's control over the litigation remains unimpaired and he can still at any time he wishes settle the case and dismiss his bill."

Another case is *Keller v. Wilson and Co.*, 195 Atl. 45 (Delaware Chancery, 1937). Plaintiff, by the caption and body of his pleading, asserted that the action was brought on the behalf of himself and all other stockholders similarly situated, seeking to have held invalid an amendment to the corporation's charter which made a change in common stock. After hearing, the case went to the Supreme Court and came back for re-trial, at which point the plaintiff compromised the controversy and a stipulation of dismissal was filed. Before the stipulation was acted upon another stockholder sought to intervene and prevent the dismissal. In stating the rule that the plaintiff had a right to control his own litigation, the Court said at p. 47:

"But assuming that the bill, notwithstanding the very definite nature of the prayers, is a class bill, does it follow that the complainants therein cannot direct its dismissal over the objections of the petitioner, a person in like class with them?

It is thoroughly settled that a Creditor who filed a bill, in behalf of himself and all other creditors remains in control of the suit until decree. It was said in *Pemberton v. Popham*, 1 Beav. 316, which was a creditor's bill, that 'until decree the other creditors had no inter-

est in the suit.' The complainant may dismiss such a bill at any time so long as his position of *dominus litis* continues. 1 *Daniel, Chancery Pleading and Practice* (4th Am. Ed.) 235, 236. The authorities upon this point are fully stated and ably reviewed in *Hirshfeld v. Fitzgerald*, 157 N. Y. 166, 51 N. E. 997, 46 L. R. A. 839."

In this case the stockholder was aware of the litigation and only when the plaintiff had negotiated his settlement was intervention sought. As the court said in its 12th Syllabus, the stockholder had a right to have his suit dismissed and use such right as a bargaining point in making a settlement, so that Keller in that case could not, as Young seeks to do in this case, prolong the litigation in which he had failed to enter at the appropriate time.

So on reason and authority Potts and Boag acted within their rights in dismissing their appeal in the Court of Appeals of this Circuit; and intervention having been denied applicant Young, what right has he to an accounting, even if Potts and Boag received an excessive price for their stock. He stood by, consented to confirmation of the Plan, and at this late date seeks to have an accounting from others who were diligent.

JURISDICTION OF BANKRUPTCY COURT TO REQUIRE AN ACCOUNTING WHERE RES IS IN POSSESSION OF ANOTHER.

In considering the question of jurisdiction, attention is first directed to the final decree of discharge of Debtor entered December 1, 1942, wherein jurisdiction was specifically retained for the Special Master to consider the amended application for institution of proceedings filed on November 20, 1942, on behalf of Robert R. Young, together with all questions in connection with said application and any litigation which may be instituted by said Robert R. Young pursuant to any ruling the court may make on his said application.

Counsel for Bradley and Murphy urge that in order for the Bankruptcy Court to have jurisdiction of a collateral issue, such issue must involve a *res* then in possession of the Bankruptcy Court in which the parties claim some rights; and contra a collateral dispute which does not affect

the bankrupt or the bankrupt's property is beyond the jurisdiction of the Bankruptcy Court. They urge that if the action is a representative action brought on behalf of all Preferred Stockholders, then Young's rights must be based on the theory that there is a sum of money owing from respondents to a certain class of stockholders of the Debtor, in which event the money owing is not the property of the Debtor and the Debtor is not involved, whether or not any money is recovered.

The jurisdiction of the Federal Court sitting in Bankruptcy is limited to the matters conferred by Statute or implied therefrom. This question was examined and recently discussed in *Re Bender Body Company*, 47 A. B. R. ns 353. As *Collier on Bankruptcy* says in the new 14th Ed. the provision in Sec. 2b of the Bankruptcy Act that "nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess for certain specified powers not herein enumerated" does not extend to powers beyond those expressly conferred by the Act, and those necessary to give full effect to the jurisdiction conferred.

Having acquired jurisdiction in any particular case as *Collier* points out, "it is incumbent upon the court * * * to make certain of jurisdiction, irrespective of the wishes of the contending parties," relying on the decision of Judge Fee, p. 257, *For West Coast Theatres*, 25 F. Sup. 250, af. (C. A. 9, 1937) 88 F. (2d) 212, 33 A. B. R. ns 471, cert. den. 301 U. S. 710, 302 U. S. 772. Further in the note on this subject *Collier* says that jurisdiction of the subject matter cannot be conferred by consent, except as provided by law in Bankruptcy Act 23b, citing cases.

Thus a Court of Bankruptcy is a creature of the Statute from which it derives its jurisdiction. That a bankruptcy court has no jurisdiction over a controversy which has no relationship to the bankrupt or his property except that the litigants happen to be stockholders was considered in *Nixon v. Michaels*, 38 F. (2d) 420, 15 A. B. R. ns 489 (C. A. 8, 1930) and on this subject of limited jurisdiction Circuit Judge Booth said:

"A District Court of the United States sitting as a court of bankruptcy is a court of limited jurisdiction. Limitations exist as to subject matter; as to ter-

ritory; as to the residence and occupation of the debtor to be adjudicated; and as to other matters. *Remington on Bankruptcy* (3rd Ed.) Chap. III. And consent cannot confer jurisdiction over subject matter. The express provisions of the statute and the necessary implication are controlling. *Id.* p. 66; *Bardes v. Hawarden Bank*, 178 U. S. 524, 4 A. B. R. 163, and other cases * * *

But leaving out of consideration preferential and fraudulent transfers, unless there is involved a *res* in the possession of the bankruptcy court, and in which *res* as a part of the bankrupt estate third parties claim rights, the bankruptcy court has no jurisdiction to allow such third parties to come into the bankruptcy court merely to litigate therein, rights even against parties to the bankruptcy proceeding, and even though the property involved may once have been part of the bankrupt estate."

The question of the limitations of jurisdiction of the bankruptcy court in a reorganization proceeding where the controversy is between other parties than the bankrupt was considered in the recent case of *Re Burton Coal Co.*, 126 F. (2d) 447 (C. A. 7, 1942) 48 A. B. R. ns 672, where it was conceded that ordinarily the bankruptcy court would not take jurisdiction of a controversy between two parties concerning which the trustee of the bankrupt estate has no interest. Circuit Judge Evans pointed out however that there is an exception to the rule that where the debtor is seeking reorganization and it is necessary to determine the title to stock where the approval of the stockholders is necessary to complete the reorganization, and said at page 448:

"It was impossible to administer the estate, or to organize the debtor, without determining the controversy between appellants and appellee respecting this stock. Upon that determination depended the amount of appellee's claim against the debtor. Because of such fact the jurisdiction of the court of bankruptcy is extended beyond what it ordinarily would be. It extends to disputes such as existed between

appellants and appellee without the settlement of which reorganization cannot proceed."

In the present proceeding the question of ownership was reserved and determined in another proceeding and was not necessary to complete the reorganization which has heretofore been accomplished in the present proceeding. So the case at bar is not within the exception, and the general rule would seem to be applicable that the bankruptcy court has no jurisdiction of this controversy.

As Judge Evans said in another bankruptcy case in *Re Railroad Supply Co.*, 78 F. (2d) 530, 48 A. B. R. ns 444 (C. A. 7, 1935) it is generally held that a court of bankruptcy will not digress in the administration of a bankruptcy estate to settle collateral disputes. What validity any judgment of recovery against respondents would have seems uncertain since the jurisdiction to hear this controversy is only by consent of the parties in a case where the question of jurisdiction of the court might be in doubt. Any judgment of recovery would probably be open to attack as was the judgment of a District Court found to be void in *United States of America v. U. S. F. & G. Co.*, 309 U. S. 506, 32 A. B. R. ns 43 (1940) where it was held that a judgment of the District Court in a bankruptcy case was found invalid since the bankruptcy court was without jurisdiction to render a judgment against the sovereign. Consent of parties and counsel was of no avail on a collateral attack and the judgment in the District Court was held void for want of jurisdiction.

FINDINGS OF FACT.

1. On September 30, 1935 Midamerica Corporation, controlled by Ball or the Ball Foundation (both of which are hereinafter referred to as Ball), purchased at public auction, among other things, the following:

\$1,292,534.74 6% subordinated note of The Higbee Company due March 1, 1934

\$69,673.71 participation in \$523,043.51 note of The Higbee Company due March 1, 1934

\$258,506.74 6% subordinated note of The Higbee Company due March 1, 1934

100,000 shares no par value of the common stock of
The Higbee Company

all of which are hereinafter referred to and designated as "said securities."

2. In January of 1937 Charles L. Bradley and John P. Murphy opened negotiations with Ball for the purchase of said securities, and on May 15, 1937 these negotiations between Bradley and Murphy and Ball were completed; and on June 4, 1937 said securities were delivered to Bradley and Murphy, who in turn paid to Ball \$60,000 in cash and delivered to Ball their promissory note for \$540,000, pledging said securities as collateral for the payment of said note.

3. From June 4, 1937 until March 2, 1942 Ball was the owner of said Bradley-Murphy note and had physical possession of the securities as collateral to said note.

4. On May 5, 1937 the Young-Kirby-Kolbe syndicate bought from Ball, among other things, 93% of the outstanding capital stock of Midamerica Corporation, which thereupon, by change of name only, became The Terminal & Shaker Heights Realty Company.

5. Under date of March 2, 1942, in settlement of litigation brought by Young and Kirby (as two of the members of the syndicate) against Ball, Ball assigned and set over to The Terminal & Shaker Heights Realty Company (hereinafter referred to as Midamerica) all of his right, title and interest in certain notes, including said Bradley-Murphy note and in addition thereto whatever interest Ball might have as pledgee in whatever assets secured the notes so assigned.

6. Under date of March 3, 1942 Young and Kirby, who were in complete control of Midamerica and who either themselves or together with members of Young's family owned substantially all of its stock, and for the purpose of realizing on said Bradley-Murphy note, caused Midamerica to serve upon Bradley and Murphy a notice in writing to the effect that it (Midamerica) was now the owner of the Bradley-Murphy note; that it declared the note immediately due and payable; that it would sell the collateral (consisting of said securities) on March 13, 1942;

and that it reserved the right to bid for and purchase the collateral at the sale.

7. The Bradley-Murphy note on its face provided that, in the event of public sale at a price greater than the amount due thereon, the holder of the note was under no obligation to pay or account to the makers thereof for such overplus or any part thereof.

8. The Amended Plan of Reorganization of The Higbee Company which had been on September 27, 1940 filed in this Court, provided that The Higbee Company should issue to the owner of said securities the following:

- (a) A new note in the aggregate principal amount of \$600,000 dated as of the date of the final confirmation of the Plan of Reorganization bearing interest at the rate of 4% per annum;
- (b) 14,549.9 shares of the new common stock of The Higbee Company.

9. Prior to the filing of said Amended Plan of Reorganization, J. F. Potts and William W. Boag had been members of the New Preferred Stockholders Committee, but they resigned at that time as members of such Committee because they disagreed with the other members of the Committee respecting the treatment of the Junior Indebtedness, which treatment as set forth in the Amended Plan of Reorganization was agreeable to all members of the Committee except Potts and Boag.

10. Upon their resignation as members of said Committee, Potts and Boag solicited the support of other preferred stockholders to join them in opposing the provisions of the Amended Plan of Reorganization relating to the treatment of the Junior Indebtedness; which solicitation was unsuccessful and no one joined with or authorized Potts and Boag to act for them.

11. Thereafter, and on December 18, 1940, and thenceforth until the dismissal of their appeal by the Circuit Court of Appeals on March 11, 1942, Potts and Boag, solely in their individual capacities and not as representing other interests or rights, prosecuted their objections and exceptions to the confirmation of the Amended Plan of Reorganization.

12. J. Fred Potts, as attorney for himself as the holder of 250 shares of First Preferred stock of The Higbee Company and as attorney for William W. Boag, the holder of 10 shares of Preferred Stock of The Higbee Company, on February 10, 1941 filed objections and exceptions to the ad interim report of the Special Master recommending approval of the Amended Plan of Reorganization of The Higbee Company.

13. At the time of the filing of these exceptions Potts invited Young to join therein and Young refused.

14. Thereafter, and on May 28, 1941, (less than six weeks after the United States Circuit Court of Appeals in *Re Van Sweringen Company*, 119 F. (2d) 231, 46 A. B. R. ns 148, held that Midamerica never had anything other than a nominal interest in The Cleveland Terminals Building Company) Young and Kirby brought an action against Charles L. Bradley and John P. Murphy, No. 20828, on the Civil Docket of the United States District Court, for the Northern District of Ohio, Eastern Division, asking that they be declared to be the equitable owners of the Higbee securities.

15. After the institution by Young and Kirby of said suit against Bradley and Murphy on May 28, 1941, Young stated to Potts that he was not interested in the objections and exceptions theretofore filed by Potts and Boag to the confirmation of the Amended Plan of Reorganization because it was to his (Young) interest to have Bradley and Murphy get all they could for said securities under the Amended Plan of Reorganization so that there would be that much more for Young to try to take away from them.

16. On the 2nd day of July, 1941, the Amended Plan of Reorganization was confirmed by the Judge of the United States District Court.

17. On November 21, 1941, further proceedings in said cause No. 20,828 were stayed pending a final determination in the Higbee reorganization proceedings as to whether or not Young and Kirby are properly before the Bankruptcy Court on the question of the disputed ownership of said securities.

18. On November 14, 1941, Potts and Boag, acting on behalf of themselves only, appealed to the United States

Circuit Court of Appeals from the order of the United States District Court confirming the Amended Plan of Reorganization of The Higbee Company.

19. The appeal so filed by Potts and Boag was pending and undecided on March 3, 1942 at the time when Midamerica demanded payment from Bradley and Murphy of their said note.

20. The avails of said securities under the Amended Plan of Reorganization, upon final confirmation thereof, constituted ample security for financing the payment to Midamerica of the Bradley-Murphy note in the principal amount of \$540,000.

21. The appeal so filed by Potts and Boag, which in effect prevented the confirmation of the Amended Plan of Reorganization by the Judge of the United States District Court from becoming effective, assumed a substantial nuisance value, for the first time, when Midamerica served on Bradley and Murphy its notice of March 3, 1942 declaring the Bradley-Murphy note due and payable.

22. Young and Kirby knew, at the time when they caused Midamerica to serve on Bradley and Murphy said notice in writing on March 3, 1942, that the pendency of this appeal cast doubt upon the value of the Junior Debt of The Higbee Company under the terms of the Amended Plan of Reorganization.

23. Bradley and Murphy in reasonable reliance upon said notice in writing of March 3, 1942 employed counsel to institute proceedings on their behalf against Midamerica and on March 10, 1942, after resistance thereto by Young, the Court of Common Pleas of Cuyahoga County, Ohio, restrained Midamerica from selling said collateral to the Bradley-Murphy note in accordance with said notice of March 3, 1942.

24. On March 3, 1942, in reasonable reliance upon said notice in writing of March 3, 1942, Bradley and Murphy entered into negotiations with Potts, who was then in California, to purchase the Potts and Boag holdings of Preferred Stock of The Higbee Company with the intention, after having acquired said shares, to dismiss, as assignees of the rights of Potts and Boag, the appeal theretofore filed

by Potts and Boag and then pending in the United States Circuit Court of Appeals.

25. On March 3, 1942 Potts named a price for all of the shares of such Preferred Stock held by Potts and Boag of \$100,000.00; and upon the return of Potts from California he communicated with his client Boag, and was given to understand that Boag would accept his proportion of \$100,000 for the sale of said 260 shares of Preferred Stock.

26. Thereafter Young's counsel, Robert W. Purcell, conferred with Potts and Boag, at which time Purcell stated that Young would meet any offer that Potts and Boag might receive from other sources for said Preferred Stock.

27. After conferring with Young's counsel, Boag raised the price for his 10 shares of Preferred Stock of The Higbee Company from less than \$3,900 to \$25,000.

28. Bradley and Murphy on March 7, 1942, purchased from Potts and Boag said 260 shares of Preferred stock of The Higbee Company and paid therefor the sum of \$115,000, said purchase having been made so as to enable Bradley and Murphy, as assignees of Potts and Boag, to dismiss the Potts and Boag appeal and thus to accomplish a final confirmation of the Plan of Reorganization.

29. Bradley and Murphy, at the time of the purchase of said 260 shares of Higbee Company Preferred Stock from Potts and Boag, believed, and had the right to believe, that Potts and Boag were acting solely for themselves in the prosecution of said appeal to the Circuit Court of Appeals.

30. Bradley and Murphy did not conspire with Potts and Boag or participate in any such conspiracy to defraud either The Higbee Company or its preferred stockholders or to prevent either The Higbee Company or its preferred stockholders from deriving any legal or equitable benefit from the sum of money paid or to be paid by them to Potts and Boag.

31. On March 9, 1942, in reliance upon said notice in writing of March 3, 1942, Bradley and Murphy, through their counsel, and as assignees of the rights of Potts and Boag, filed in the United States Circuit Court of Appeals their stipulation with The Higbee Company dismissing the

so-called Potts and Boag appeal; and the same day Young, as the holder of 138 shares of First Preferred Stock of The Higbee Company, filed his application in the United States Circuit Court of Appeals to intervene and to become a party to such appeal and at the same time filed his objection to the dismissal of the appeal.

32. Prior thereto Young had consented to and accepted the Amended Plan of Reorganization on condition that he be permitted to contest in the reorganization proceedings, the ownership of the Junior Indebtedness of The Higbee Company.

33. In pleadings and briefs filed by Young opposing the dismissal of said appeal by the Circuit Court of Appeals, Young contended—

(a) That Potts and Boag were acting in a representative capacity on behalf of themselves and all preferred stockholders;

(b) That Bradley and Murphy had purchased the Potts and Boag stock for a large sum (erroneously stated by Young to have been \$150,000) for the purpose of accomplishing a dismissal of the appeal; and

(c) That the transaction resulted in Potts and Boag receiving certain cash consideration which did not accrue in favor of any other holders of preferred stock.

34. The Securities & Exchange Commission by telegram dated March 9, 1942 directed to the United States Circuit Court of Appeals stated that it considered the Plan of Reorganization fair and reasonable and that it had no objection to the dismissal of the appeal.

35. Between March 9, 1942 and March 11, 1942, Bradley and Murphy, Young, The Higbee Company, Potts and Boag, were each represented by counsel in hearings held by the Circuit Court of Appeals; briefs were filed by all of the parties; and oral arguments of counsel for each party were made in hearings held before a full court of the Circuit Court of Appeals.

36. On March 11, 1942, the Circuit Court of Appeals, after hearings held on several days, at which hearings

counsel for Young was present and participated, dismissed the Potts and Boag appeal and denied the application of Young for the right to intervene, which action of the Circuit Court of Appeals resulted in the final confirmation of the Amended Plan of Reorganization.

37. The evidence offered fails to show that Potts and Boag represented any other stockholders than themselves and in the filing of objections to the confirmation of the Amended Plan of Reorganization and in the prosecuting of their appeal from the order of the United States District Court confirming the Amended Plan of Reorganization, said Potts and Boag acted only for themselves individually and not as the representatives of a class and their appearance in these proceedings was at no time derivative in its nature or effect.

38. Young had no interest in the Potts and Boag appeal nor in any moneys paid or to be paid in connection with the purchase by Bradley and Murphy from Potts and Boag of 260 shares of said Preferred Stock.

39. On March 12, 1942, the Plan of Reorganization having been finally confirmed, Bradley and Murphy, in reasonable reliance upon said notice of March 3, 1942, borrowed from the National City Bank of Cleveland \$566,290.36 and pledged as security therefor their interest in said securities and thereupon made due tender to Midamerica of said sum, being the full amount of principal and interest due upon the Bradley-Murphy note, which tender so made was refused by Midamerica.

40. Under date of June 3, 1942, at the instance of Young, Midamerica addressed a further instrument in writing to Bradley and Murphy, stating that it would now accept the amount previously tendered as payment in full of the Bradley-Murphy note; and upon payment thereof would surrender the note and the collateral therefor.

41. On June 5, 1942, in reasonable reliance upon said notice in writing dated June 3, 1942, Bradley and Murphy again borrowed from the National City Bank of Cleveland the sum of \$566,290.36 and paid the same to Midamerica, as payment in full of the amount of principal and interest due upon said note; and thereupon Midamerica accepted said sum in full payment of said note and voluntarily sur-

rendered to Bradley and Murphy their note and said securities, being the collateral described therein.

CONCLUSIONS OF LAW.

1. The relief sought is an accounting primarily from Potts and Boag with a contention that Bradley and Murphy are secondarily liable, the relief being based upon the contention that—

(a) Potts and Boag in the prosecution of their appeal to the Circuit Court of Appeals were acting for themselves and all preferred stockholders; or

(b) That Potts and Boag in the prosecution of their appeal were asserting a derivative right belonging to The Higbee Company, Debtor, and derived by them through the corporation; and

(c) That Bradley and Murphy, at the time they paid to Potts and Boag \$115,000 for the preferred stockholdings of Potts and Boag, knew that Potts and Boag were acting in one or the other of said capacities and that they likewise knew that Potts and Boag intended to make no accounting of the sums paid and to be paid by Bradley and Murphy to Potts and Boag.

2. This Court, by virtue of Section III of Chapter 10 of the Bankruptcy Act, has exclusive jurisdiction of The Higbee Company, Debtor, and its property, wheresoever located.

3. Under the provisions of Sections 206 and 209 of Chapter 10 of the Bankruptcy Act, Potts and Boag had the right to be heard on all matters arising in this proceeding and had the right to act in person or by an attorney-at-law.

4. By reason of the finding of fact that Potts and Boag were acting solely for themselves and not in a representative or derivative capacity, they, being stockholders, were exercising merely their individual rights to be heard and to appear in person and by an attorney-at-law, and, as such, they had the right in law to control the proceedings instituted by them, to settle and compromise their litigation, and the settlement which they made neither involved nor produced an asset of the Debtor.

5. The settlement negotiated by Potts and Boag, having neither involved nor produced any asset of the Debtor,

the applicant in his capacity as a preferred stockholder of the Debtor is not entitled to an accounting.

6. This Court is without jurisdiction to hear or determine controversies which do not involve property or assets belonging to The Higbee Company, Debtor.

7. By reason of the findings of fact that Bradley and Murphy had no knowledge that Potts and Boag were acting for any one other than themselves in the prosecution of their said appeal to the Circuit Court of Appeals and that Bradley and Murphy did not conspire with Potts and Boag for the purpose of defrauding the preferred stockholders of The Higbee Company or The Higbee Company, Debtor, there is no basis for an order of accounting against Bradley and Murphy.

RECOMMENDATION.

The Master being duly advised in the premises, submits his recommendation as follows:

That the Amended Application of Robert R. Young for Institution of Proceedings be denied and dismissed.

It is, therefore, ordered that this Master's Ad Interim Report be presented to the District Court of the United States for the Northern District of Ohio, Eastern Division, so that the same may come on for hearing for confirmation and approval before the District Judge thereof, on Saturday, the 17th day of April, 1943, at 9:30 A.M. Any parties interested herein thereby having the twenty days from the date of its filing to enter exceptions as permitted by Statute, Rule 66, to this Master's report; so that the same may come on for hearing promptly on the day fixed for such hearing.

Herewith is transmitted for Your Honors the application and the amended application, transcript of testimony with exhibits, briefs, and findings of fact and conclusions of law and memorandum and recommendation on the several questions considered in this Ad Interim Report.

Respectfully submitted,

WM. B. WOODS,

*Special Master and Referee
in Bankruptcy.*

March 24, 1943.

Copies to:

JONES, DAY, COCKLEY & REAVIS,

GARDNER ABBOTT AND FRANK E. JOSEPH *of Counsel*,

Attorneys for Debtor,

Union Commerce Bldg.,

Cleveland, Ohio.

McKEEHAN, MERRICK, ARTER & STEWART,

C. K. ARTER AND L. C. WYKOFF *of Counsel*,

Attorneys for Bradley and Murphy,

Terminal Tower Bldg.,

Cleveland, Ohio.

J. FRED POTTS,

502 Auditorium Bldg.,

Cleveland, Ohio.

ROBERT W. PURCELL,

Attorney for Robert R. Young,

Terminal Tower Bldg.,

Cleveland, Ohio.

RICHARD B. AINSWORTH AND KENNETH NORDSTROM,

Attorneys for Securities & Exchange Commission,

Standard Bldg.,

Cleveland, Ohio.

**OBJECTIONS AND EXCEPTIONS OF ROBERT R.
YOUNG TO REPORT OF SPECIAL MASTER FILED
MARCH 24, 1943.**

(Filed April 14, 1943.)

*To the Honorable Judges of the District Court of the
United States for the Northern District of Ohio,
Eastern Division:*

Comes now Robert R. Young, preferred stockholder of
The Higbee Company, and respectfully objects and excepts

to the report of the Special Master filed March 24, 1943 as follows:

1—The Master erred in finding that no one joined with or authorized Potts and Boag to act for them in opposing the provisions of the amended plan of reorganization. (Finding No. 10)

2—The Master erred in finding that Potts and Boag acted solely in their individual capacities and not as representing other interests or rights in prosecuting their objections to the confirmation of said plan. (Finding No. 11)

3—The Master erred in finding that Potts acted as attorney for himself and Boag in filing objections and exceptions to the report of the Master recommending approval of said amended plan as he fails to find that Potts also acted for others in this respect. (Finding No. 12)

4—The Master erred in finding that the Circuit Court of Appeals held that Midamerica never had anything other than a nominal interest in The Cleveland Terminals Building Company. (Finding No. 14)

5—The Master erred in Finding No. 15 in completely misquoting the conversation therein referred to had on Mr. Young's behalf with Potts.

6—The Master erred in finding that Potts and Boag acted on behalf of themselves only in appealing to the United States Circuit Court of Appeals. (Finding No. 18)

7—The Master erred in finding that the negotiations entered into on March 3, 1942 between Bradley and Murphy and Potts were in reasonable reliance upon the notice in writing of March 3, 1942. (Finding No. 24)

8—The Master erred in finding that it was stated to Potts and Boag that Young would meet any offer that Potts and Boag might receive from other sources for their preferred stock. (Finding No. 26)

9—The Master's Finding No. 27 is completely erroneous.

10—The Master erred in finding that Bradley and Murphy at the time of their purchase of the Potts and Boag stock believed and had the right to believe that Potts and Boag were acting solely for themselves. (Finding No. 29)

11—The Master erred in finding that when Bradley and Murphy filed their stipulation for dismissal of the appeal they acted in reliance upon the notice in writing of March 3, 1942. (Finding No. 31)

12—The Master erred in finding that Young had consented to and accepted the amended plan of reorganization. (Finding No. 32)

13—The Master erred in finding that the evidence fails to show that Potts and Boag represented any other stockholders than themselves. (Finding No. 37)

14—The Master's Finding No. 38 is completely erroneous.

15—The Master erred in making the following findings because there is no competent evidence of any kind or character in the record of the hearing of this case in support thereof and they contain statements which are at variance with the facts if there were any evidence upon which any finding whatever could be made: Findings Nos. 1, 2, 3, 4, 5, 6, 7, 17, 23, 39, 40, and 41.

16—Objection is made generally to each and every statement contained in the so-called "Statement of Facts" and so-called "Memorandum" which is adverse to the contentions made herein by this Objector.

17—The Master erred in holding that the preferred stockholders of the Debtor are not entitled to an accounting.

18—The Master erred in holding that the Court is without jurisdiction to hear or determine this controversy.

19—The Master erred in holding that there is no basis for an order of accounting against Bradley and Murphy.

Respectfully submitted,

R. W. PURCELL,

Attorney for Robert R. Young.

Dated April 14, 1943.

**MEMORANDUM ON AD INTERIM REPORT OF
SPECIAL MASTER.**

(Filed June 10, 1943.)

JONES, J.:

Based upon a knowledge of the history of these proceedings, it must frankly be said that this matter arises out of a personal controversy between the exceptor Young, and Bradley and Murphy, growing out of earlier relationships and over the control of The Higbee Company. One phase of the contest respecting ownership of the junior indebtedness of The Higbee Company has been heard and decided by this Court. (See memorandum filed February 16, 1943.) The matter is now in appeal. That controversy did not involve the Higbee reorganization and the question presented here does not involve the Higbee reorganization, as I see it.

The Higbee Company plan of reorganization long since has been confirmed and was acceptable to every interest except to preferred stockholders Potts and Boag, who appealed from the order of confirmation of this court. While the appeal was pending, Bradley and Murphy negotiated with Potts and Boag and bought their stock in consideration of those two stockholders dismissing their appeal. Before the appeal was dismissed, Young petitioned the Circuit Court of Appeals to intervene on the ground that Potts and Boag had brought the appeal as representatives of other first preferred stockholders of The Higbee Company; that he, Young, was one of such stockholders and desired to oppose dismissal. The Circuit Court of Appeals, upon hearing, denied his petition to intervene and entered a dismissal of the appeal. Young now seeks in this court an order permitting him to engage attorneys on behalf of The Higbee Company and to sue Potts and Boag and Bradley and Murphy for an accounting in respect of the stock sale for the benefit of The Higbee Company, or, in the alternative, for the benefit of all first preferred shareholders. This, in substance and effect, presents the same questions raised by the petition to intervene in the Circuit Court of Appeals, and which was determined adversely to Young.

It is true that Potts and Boag were at one time members of a preferred stockholders' committee, from which

they resigned in November, 1940, because of disagreement over policy, the treatment of the junior indebtedness, and other matters relating to the plan as it affected first preferred stockholders. It also is true that they did try to form another committee, but nothing came of it. No stockholders responded and none sought to join with them. The record indicates that Young was given an opportunity to join, but would take no active part in such proposal. Potts and Boag had opposed the approval and confirmation of the plan consistently, upon several grounds, as not fair and equitable to the first preferred stockholders, but I am unable to find that in their objections to the confirmation and their appeal from the order of confirmation they were representing any stockholders except themselves.

It well may be that Bradley and Murphy paid a sum greatly in excess of the then value of the first preferred stock, but that was an investment for which they were personally responsible and The Higbee Company was in no way affected or involved. Nor were its assets or financial position in any way impaired. Bradley and Murphy must have believed that their personal financial interest in the Higbee Company justified the sum paid by them for the Potts and Boag stock, in the interest of terminating the controversy over the confirmation of the plan of reorganization. Thus, it seems to me the question of whether the amended application for the institution of suit should receive favorable action in the alternative wholly depends upon whether Potts and Boag were appealing from the order of confirmation as representatives of all first preferred shareholders or solely in their individual capacities.

No other stockholder appears to have joined in the appeal or had sought to intervene, although the first preferred shareholders were adequately represented by a then existing committee with counsel; and, except for Young's petition to intervene in the Circuit Court of Appeals to oppose dismissal, no other preferred stockholder, or any stockholders' committee, except Potts and Boag, had filed any objection. No other preferred stockholder has joined with Young in this proceeding, nor has his amended application been presented as a class proceeding brought on behalf of other first preferred stockholders.

The fact that Potts and Boag continued to urge that the plan was unfair and inequitable to the first preferred stockholders does not support the claim that they were representing all such preferred stockholders. Under the Bankruptcy Act (Sees. 206, 209) any stockholder may act on his own behalf. The Court did refuse to enter an order approving the sale of the stock, because there was no basis upon which to bottom its approval. It was not clear then what the effect of the sale might be and the Court did not wish to foreclose any question in regard to it as it might affect the reorganization or the debtor; but neither The Higbee Company nor its reorganization was affected, nor were its assets in any way impaired by the sale of the stock or the dismissal of the appeal.

If Bradley and Murphy chose to obligate themselves personally by the payment of a sum so far in excess of the then market value of the stock, for the purpose of buying peace for The Higbee Company and for themselves, as owners of other securities of The Higbee Company, I do not see how they thus could make themselves liable to either Higbee or the first preferred stockholders. I am unable to find that Bradley and Murphy had any reason to believe that Potts and Boag were representing any stockholders but themselves in filing their appeal or in negotiating for the sale of their stock and the dismissal of the appeal.

Since the Court is unable to find, under the circumstances presented, that Potts and Boag were acting in a representative capacity, or on behalf of all or any other first preferred stockholders, in opposing the final confirmation or in prosecuting an appeal from the order of confirmation, the amended application for institution of proceedings must be denied and dismissed. Although, in the view of the case taken, it is unnecessary to decide the question of jurisdiction considered by the Master, I am inclined to the opinion that the bankruptcy court would have adequate jurisdiction and power to determine the question of accountability for such sale and dismissal of appeal if Potts and Boag had been found to have been representing or acting in behalf of other preferred stockholders in opposing confirmation of the plan and in the prosecution of the appeal, and this for the reason that at that stage of the

proceedings, and until discharge after the plan should be put in execution, the Court retains jurisdiction adequate to protect the rights of creditors and stockholders as well as the rights of the debtor.

With this qualification, the report of the Master will be confirmed and his recommendation and findings of fact and conclusions of law approved and adopted.

JONES,

United States District Judge.

June 10, 1943.

**JOURNAL ENTRY ON AD INTERIM REPORT OF THE
SPECIAL MASTER FILED HEREIN MARCH 24,
1943.**

(Entered June 18, 1943 by Paul Jones, Judge.)

This cause having come on for hearing upon the amended application of Robert R. Young for institution of proceedings, the ad interim report of the Special Master with respect thereto, the objections and exceptions to the ad interim report and to the findings of fact and conclusions of law of the Special Master filed by Robert R. Young, the evidence and exhibits and the briefs filed by counsel, and upon consideration thereof the Court finds:

(a) The findings of fact contained in the ad interim report of the Special Master are supported by the evidence and, in so far as the record shows any conflict in the testimony, said findings are consistent with reasonable inferences and conclusions to be drawn from the evidence;

(b) The Bankruptcy Court has jurisdiction and power to determine all questions raised by the amended application for institution of proceedings;

(c) All of the findings of fact contained in the ad interim report of the Special Master heretofore filed are hereby adopted as findings of fact of this Court.

It is therefore ORDERED, ADJUDGED AND DECREED:

1. Except to the extent that finding (b) as hereinabove set forth is in conflict therewith, the ad interim report of the Special Master heretofore filed herein is hereby in all respects ratified, approved and confirmed and the objections and exceptions filed thereto are overruled.

2. The amended application of Robert R. Young for institution of proceedings is hereby denied and dismissed.

3. The costs of all of the proceedings in connection with the application and the amended application of Robert R. Young for the institution of proceedings, including the costs incurred before the Special Master, are hereby assessed against and ordered to be paid by Robert R. Young.

JONES,

United States District Judge.

Entered June 18th, 1943.

Approved:

.....
Attorney for Robert R. Young.

NOTICE OF APPEAL TO THE CIRCUIT COURT OF APPEALS.

(Filed July 17, 1943.)

Notice is hereby given that Robert R. Young, a stockholder herein, hereby appeals to the Circuit Court of Appeals for the Sixth Circuit from the final judgment entered in this case on June 18, 1943.

ROBERT W. PURCELL,

Attorney for Appellant,

Robert R. Young.

BOND ON APPEAL.

(Filed July 17, 1943.)

KNOW ALL MEN BY THESE PRESENTS, that I, Robert R. Young, as Principal, and Indemnity Insurance Company of North America, as Surety, are held and firmly bound unto J. F. Potts, William W. Boag, Charles L. Bradley and John P. Murphy in the full and just amount of Two Hundred Fifty Dollars (\$250.00), to be paid to the said J. F. Potts, William W. Boag, Charles L. Bradley and John P. Murphy, their successors or assigns; to which payment well and truly to be made, I bind myself, my heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with my seal and dated this 17th day of July, 1943.

WHEREAS, on the 18th day of June, 1943, in the above entitled proceedings an Order, Judgment and Decree was entered ratifying, approving and confirming the ad interim report of the Special Master filed March 24, 1943, and overruling the objections and exceptions filed thereto by Robert R. Young, and

WHEREAS, the said Robert R. Young has appealed to the United States Court of Appeals for the Sixth Circuit to reverse said Orders,

NOW THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, that if the said Robert R. Young pay the Costs, if the Appeal is dismissed or the Orders affirmed or such costs as the Appellate Court may award if the Orders are modified, then the above obligation to be void; else to remain in full force and effect.

ROBERT R. YOUNG,

Principal,

Per ROBERT W. PURCELL,

Attorney.

INDEMNITY INSURANCE CO. OF NORTH
AMERICA, (Seal)

By F. G. MERRILL,

Surety,

Attorney-in-Fact.

**ORDER EXTENDING TIME FOR FILING RECORD
ON APPEAL.**

(Entered July 31, 1943 by Paul Jones, Judge.)

After hearing, and upon good cause shown, it is hereby
ORDERED, ADJUDGED AND DECREED:

That the time within which Appellant, Robert R. Young, may file the record on appeal from the judgment of this Court entered herein on June 18, 1943, and docket the action, be and the same hereby is extended to September 14, 1943.

**DESIGNATION OF CONTENTS OF RECORD ON
APPEAL.**

(Filed August 14, 1943.)

To the Clerk:

Please prepare transcript of record for the Circuit Court of Appeals in the above entitled cause, and include therein the following papers and orders:

1. Amended application of Robert R. Young for institution of proceedings, filed November 21, 1942.
2. Transcript of proceedings before Special Master, November 23, 1942.
3. Young Exhibits 1 to 26 inclusive.
4. Bradley and Murphy Exhibits 1 to 12 inclusive.
5. Final decree of discharge, December 1, 1942.
6. Ad interim report of Special Master filed March 24, 1943.
7. Objections and exceptions of Robert R. Young to report of Special Master, filed April 14, 1943.
8. Memorandum of Judge Jones on report of Special Master, June 10, 1943.
9. Journal entry on report of Special Master, entered June 18, 1943.

10. Notice of appeal by Robert R. Young, filed July 17, 1943.
11. Bond on appeal filed July 17, 1943.
12. Order extending time for filing record on appeal to September 14, 1943—filed July 30, 1943.
13. This designation of contents of record.
14. Stipulation re Certification of Record.

And deliver all papers to The Gates Legal Publishing Company for printing.

ROBERT W. PURCELL,
Attorney for Appellant, Robert R. Young.

CHARLES K. ARTER & L. C. WYKOFF,
*Attorneys for Appellees,
C. L. Bradley and J. P. Murphy.*

J. F. POTTS,
*Attorney for Appellee,
J. F. Potts.*

STIPULATION RE CERTIFICATION OF RECORD.

(Filed August 14, 1943.)

It is hereby agreed that the record as presented to the clerk by the printer may be certified by the clerk as required by law and the rules of the Appellate Court as a true, full and complete copy of the original pleadings, papers and orders used on the trial of this cause as set forth in the Designation for transcript without further comparison by the clerk.

ROBERT W. PURCELL,
Attorney for Robert R. Young.

CHARLES K. ARTER & L. C. WYKOFF,
*Attorneys for C. L. Bradley &
J. P. Murphy.*

J. F. POTTS,
Attorney for J. F. Potts.

**STIPULATION AND ORDER EXTENDING TIME FOR
FILING TRANSCRIPT OF RECORD TO SEPTEMBER 18, 1943.**

(Filed September 2, 1943.)

It is hereby stipulated between the parties hereto that the time for filing the Transcript of Record in the United States Circuit Court of Appeals shall be extended to September 18, 1943, the Honorable Court-consenting.

ROBERT W. PURCELL,

Attorney for Robert R. Young.

CHARLES K. ARTER and L. C. WYKOFF,

*Attorneys for C. L. Bradley and
J. P. Murphy.*

J. F. POTTS,

Attorney for J. F. Potts.

It is so ordered,

JONES,

U. S. District Judge.

CERTIFICATE OF CLERK.

NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION, SS.

I, C. B. Watkins, Clerk of the United States District Court, within and for said district, hereby certify that the foregoing printed pages contain a full, true and complete copy of the pleadings and other papers in this cause in accordance with the Stipulated Designation of Contents of Record on Appeal filed herein.

In Testimony Whereof, I have hereunto signed my name and affixed the seal of said court at Cleveland, in said district, this 17th day of September, A. D. 1943.

C. B. WATKINS, *Clerk.*

(Seal)

By K. V. WILSON,
Chief Deputy.

**PROCEEDINGS IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

CAUSE ARGUED AND SUBMITTED

(February 23, 1944—Before: SIMONS, ALLEN and
HAMILTON, JJ.)

This cause is argued by Robert W. Purcell for Appellant and by J. F. Potts and L. C. Wykoff for Appellees and is submitted to the court.

ORDER OF REVIVOR

(Entered February 23, 1944)

It appearing to the court that Charles L. Bradley, one of the appellees herein, died on December 18, 1943,—

It is now ordered that these causes stand revived in behalf of or against Gertrude Baker Bradley and Alva Bradley, as Executors of the estate of Charles L. Bradley, deceased.

JUDGMENT

(Entered May 15, 1944)

This case came on to be heard upon the briefs and record and oral argument of counsel.

And it appearing that this controversy arises out of the sale on or about March 7, 1942, of 250 shares of preferred stock of the Higbee Company, debtor, in a reorganization proceeding, and ten shares of stock in the same company owned by J. F. Potts and William W. Boag, respectively, to C. L. Bradley and J. P. Murphy, for a total consideration of \$115,000, an amount far in excess of the value of the shares;

And it appearing that Potts and Boag at the time of the sale were prosecuting an appeal from the order of the United States District Court for the Northern District of Ohio, Eastern Division, confirming the amended plan of reorganization of the debtor, which was dismissed March 11, 1942;

And it appearing that the amended application of appellant for institution of proceedings filed herein prays that an order be entered either (1) authorizing him to employ counsel on behalf of the debtor to institute proceedings against J. F. Potts, William W. Boag, C. L. Bradley, J. P. Murphy and any other party who may be liable, to compel an accounting and payment over to the debtor of a sum equal to the difference between the fair value of the preferred stock which was sold by Potts and Boag to Bradley and Murphy and the sum of \$115,000, or (2) directing the same individuals to pay to the first preferred stockholders of the debtor the difference between the fair value of such preferred stock and the sum of \$115,000;

And it appearing that the relief sought is an accounting primarily from Potts and Boag and secondarily from Bradley and Murphy, the claim being based upon the contention that (a) Potts and Boag in the prosecution of their appeal to this court were acting for themselves and all preferred stockholders, or (b) that Potts and Boag in the prosecution of their appeal were asserting a derivative right belonging to the debtor; and (c) that Bradley and

Judgment

Murphy, at the time of the sale, knew that Potts and Boag were acting in one or the other of such capacities and that they intended to make no accounting of the sums paid and to be paid by Bradley and Murphy;

And it appearing from the findings of the master, confirmed by the District Court and supported by the evidence, that Potts and Boag represented no other stockholders than themselves and acted only for themselves individually and not as representatives of a class, both in the filing of objections to the confirmation of the amended plan of reorganization and in prosecuting their appeal from the court's order confirming the amended plan of reorganization, and at no time asserted a derivative right belonging to the debtor:

It is ordered that the order of the District Court entered June 18, 1943, adopting all the findings of fact of the special master and in the main ratifying, approving and confirming the ad interim report of the special master filed March 24, 1943, overruling objections and exceptions thereto, and denying and dismissing the amended application of appellant for institution of proceedings, be, and it is in all things, affirmed.

CLERK'S CERTIFICATE**UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

I, J. W. MENZIES, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of Record and Proceedings in the case of *Robert R. Young v. The Higbee Company, et al.*, No. 9637, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 7th day of August, A. D. 1944.

J. W. MENZIES,

*Clerk of the United States Circuit Court
of Appeals for the Sixth Circuit.*

(SEAL)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

AUG 14 1944

CHARLES ELMORE COPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM 1944.

No. 342.....

In the Matter of
THE HIGBEE COMPANY, Debtor. } BANKRUPTCY No. 36,119

ROBERT R. YOUNG,
Petitioner,

VS.

THE HIGBEE COMPANY,
WILLIAM W. BOAG, and
J. F. POTTS,
Respondents.

**PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Sixth Circuit
and
BRIEF IN SUPPORT OF PETITION.**

JAMES A. BUTLER,
Bulkley Bldg.,
Cleveland, Ohio,

ROBERT W. PURCELL,
Terminal Tower,
Cleveland, Ohio,

*Attorneys for Petitioner,
Robert R. Young.*

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<i>Gruenewald v. Moir Hotel Co.</i> , 96 Fed. (2) 932 (C. C. A. 7, 1938)	22
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In the Supreme Court of the United States

OCTOBER TERM 1944.

No.

In the Matter of

THE HIGBEE COMPANY, Debtor.)

BANKRUPTCY No. 36,119.

ROBERT R. YOUNG,

Petitioner,

vs.

THE HIGBEE COMPANY.

WILLIAM W. BOAG, and

J. F. POTTS,

Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals

For the Sixth Circuit.

*To The Honorable The Chief Justice and Associate Justices
of the United States:*

Petitioner Robert R. Young hereby petitions for the issuance of a Writ of Certiorari to review the judgment^{of} of the United States Circuit Court of Appeals for the Sixth Circuit rendered herein on May 15, 1944.

STATEMENT OF THE MATTER INVOLVED.

This is a controversy arising out of the corporate reorganization proceedings of The Higbee Company pursuant to Chapter X of the Bankruptcy Act. Petitioner was, at the time of the transaction involved, a holder of First Preferred Stock of The Higbee Company, Debtor. Petitioner still holds the securities which pursuant to the Plan of Reorganization were issued in respect of those shares.

Respondents Potts and Boag were members of a Preferred Stockholders Committee and had appealed to the Circuit Court of Appeals for the Sixth Circuit from the order of the District Court confirming a Plan of Reorganization for Higbee. Potts was also the attorney for the Committee. Potts was the owner of 250 shares, and Boag the owner of 10 shares of the First Preferred Stock of Higbee.

Messrs. C. L. Bradley and J. P. Murphy were directors of Higbee and Bradley was its President. Bradley and Murphy individually held large claims against The Higbee Company. The validity and amount of these claims were the issues involved in the Potts and Boag appeal.

On March 7, 1942 Bradley and Murphy, being anxious that the Plan be approved, paid Potts and Boag \$115,000 for their shares which then had a current market value of approximately \$15,000. By an express provision in the contract of sale Bradley and Murphy succeeded to the rights of Potts and Boag in the appeal. (R. 223) They forthwith caused the dismissal of the appeal and consequent final confirmation of the Plan of Reorganization, thus avoiding a determination by the Circuit Court of the merits of the questions raised by the appeal. Potts himself characterized the transaction as "selling the appeal." (R. 188)

It is the contention of Petitioner that this transaction was wrongful because it was done by persons occupying a fiduciary capacity, and because it deprived their beneficiaries of an adjudication of important legal questions pertaining to substantive rights. Consequently an order was prayed below directing Potts and Boag to turn over to The Higbee Company for the sole benefit of its first preferred stockholders the \$100,000 bonus which they received, that being the difference between the fair market value of the securities sold to Bradley and Murphy and the price received.

The Special Master who heard the case found (R. 242):

“On November 14, 1941, Potts and Boag, acting on behalf of themselves only, appealed to the United States Circuit Court of Appeals from the order of the United States District Court confirming the Amended Plan of Reorganization of The Higbee Company.”

The Circuit Court of Appeals while not rendering an opinion found in its memorandum as follows:

“And it appearing from the findings of the master, confirmed by the District Court and supported by the evidence, that Potts and Boag represented no other stockholders than themselves and acted only for themselves individually and not as representatives of a class, both in the filing of objections to the confirmation of the amended plan of reorganization and in prosecuting their appeal from the court’s order confirming the amended plan of reorganization, and at no time asserted a derivative right belonging to the debtor:” etc.

The Circuit Court of Appeals thus affirmed the judgment of the District Court.

Petitioner agrees that, as the matter turned out, a finding that Potts and Boag were actually acting only for themselves is fully warranted. Had they been acting for those whom they stated they represented, they would have turned over the proceeds of the sale of their appeal for distribution among all the members of the class.

It cannot be disputed, however, that Potts and Boag openly, although apparently in bad faith, held themselves out to be a committee organized for the protection of the preferred stockholders of Higbee. They made statements to this effect in briefs and pleadings filed with the District Court and they circularized the preferred stockholders with letters under the letterhead of “Independent Preferred Stockholders’ Committee of The Higbee Company.” (R. 172) (The evidence on this score will be more fully analyzed in the brief below.)

The question which must be determined is whether Potts, an attorney, and Boag, who together formed a stockholders' committee, shall be relieved of their obligation to account to their beneficiaries by reason of an undisclosed mental determination that they were acting for themselves only. It is Petitioner's contention that Potts and Boag should be held to accountability by reason of their statements and representations that they were acting in behalf of all stockholders, any undisclosed mental reservations to the contrary notwithstanding. It was on March 7, 1942, the day of the sale to Bradley and Murphy, that Potts and Boag first stated that they were actually acting only for themselves. This mental determination which was contrary to the communications they had sent to the preferred stockholders is the apparent reason why the Circuit Court has affirmed an order of the District Court exonerating Potts and Boag from the duty of accounting for their profit to the members of the class whom they stated they represented. This is the error of which complaint is here made.

THE QUESTIONS PRESENTED.

1—After Potts and Boag had represented to the Court and to the Higbee Preferred Stockholders that they were acting as a committee in the interests of all preferred stockholders, can they thereafter accept and retain for themselves individually a \$100,000 consideration for permitting the dismissal of an appeal which they had taken from a decree confirming the Amended Plan of Reorganization of The Higbee Company?

2—Should Potts and Boag be required to pay over to The Higbee Company for its First Preferred Stockholders the aforesaid \$100,000 consideration which they received for permitting the dismissal of the appeal?

REASONS FOR ALLOWANCE OF THE WRIT.

The Supreme Court should issue the Writ of Certiorari in this case because a question of paramount importance to the fair conduct of reorganization proceedings is presented for determination. A large class of public stockholders was interested in the Higbee proceedings. Respondents Potts and Boag were members of two successive stockholders' committees and as such sent communications to the stockholders. Class representation of this character having a somewhat indefinite inception and being nebulous in character requires the protection of the Court. The transaction in this case represents a trafficking in reorganization proceedings of the most serious nature. The decision in the case permits a class representative to change character and become an individual litigant at any time that it suits his fancy and pocketbook to do so without any notice to the class or even to the Court.—This we submit is of paramount importance to the fair conduct of corporate reorganization proceedings.

JURISDICTION.

The jurisdiction of this Court to grant the Writ is invoked under Judicial Code Section 240 as Amended (Title 28 U. S. C. A. Section 347). The judgment of the United States Circuit Court of Appeals for the Sixth Circuit was rendered May 15, 1944 and this petition is filed within the statutory period (28 U. S. C. A. 350).

PRAYER FOR RELIEF.

WHEREFORE the petitioner, by his counsel, prays the issuance of a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to the end that

the judgment may be reversed, and for such other relief as to the Court may seem appropriate.

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In the Supreme Court of the United States

OCTOBER TERM 1944.

No.

In the Matter of
THE HIGBEE COMPANY, Debtor } BANKRUPTCY No. 36,119.

ROBERT R. YOUNG,

Petitioner,

vs.

THE HIGBEE COMPANY,

WILLIAM W. BOAG, and

J. F. POTTS,

Respondents.

BRIEF IN SUPPORT OF PETITION.

STATEMENT OF FACTS.

At all times since 1937 C. L. Bradley and J. P. Murphy were asserting large claims against Higbee—claims aggregating over \$1,500,000—based on certain promissory notes (referred to as the Junior Indebtedness) which they had purchased from George and Frances Ball Foundation for much less than their face value at a time when Bradley was a director of Higbee. (R. 229.)

During and prior to August of 1938, Respondents Potts and Boag were members of the "New Preferred Stockholders' Committee" and as such were objecting to the allowance of the claims filed by Bradley and Murphy on the grounds that the Junior Indebtedness was not a valid debt of Higbee, but should be considered a capital advance; or in the alternative that Bradley and Murphy should not be permitted to claim against Higbee for an amount larger

than the purchase price to Bradley and Murphy of the junior notes (Young Ex. 1, R. 81).

By December 18, 1940 Potts and Boag had resigned from the then existing stockholders' committee. On that day there was a hearing before the Special Master on the Amended Plan of Reorganization and at such hearing Potts announced to the court that he was forming a new stockholders' committee to continue objections to the Plan and to make an application to the court for the appointment of disinterested counsel, as he was then asserting that it was unfair to the preferred stockholders for counsel then acting for the Debtor to continue to do so in view of their reluctance to object to the Bradley-Murphy claims. On that occasion Potts stated to the Master as follows (Young Ex. 18, R. 185):

"A new stockholders' committee will be formed, and whether or not we call it a new new stockholders' committee, I don't know, but it will have to be given some name so that we can differentiate it from the other stockholders' committee, and I think, after talking with Mr. Ewing, that the objections can be consolidated so that you will have to deal with just one committee in the very near future."

Pursuant to the notification given to the Master, Potts and Boag filed an application for the appointment of special counsel and a brief in support thereof (Young Ex. 5, R. 112, Ex. 6, R. 115).

The Master overruled the objections, and Potts and Boag excepted to the report (Young Ex. 7, R. 121) and filed a brief in support of the exceptions. Again Potts persisted in his objections to the Bradley-Murphy claims and to the compromise thereof proposed in the plan as being unfair to all of the preferred stockholders.

A reply brief of Potts and Boag (Young Ex. 9, R. 146) was submitted to the court in answer to the Debtor's brief which argued in support of the Master's report. This

reply brief makes the following very significant statement (R. 147):

"SECOND, it has been stated that objectors own and therefore represent only 260 shares of Higbee First Preferred. While we believe that the owner of a single share has as much right to be heard as the owner of many shares, we wish to point out to the court that objectors were originally members of the New Preferred Stockholders' Committee; that objectors resigned from said committee in protest over the unauthorized action of its counsel in approving this Plan. The representation which said New Preferred Stockholders' Committee now claims was acquired mainly through the presence on such Committee of Messrs. Potts and Boag, the present objectors, *and it is now a fact that a very large proportion of the stockholders which the New Preferred Stockholders' Committee claims to represent actually look to these objectors for the protection of their interest.* The two remaining members of that committee are the owners of 10 shares of Preferred Stock each." (Emphasis added.)

On July 10, 1941 Potts and Boag sent a letter (Young Ex. 14, R. 172) to all of the holders of First and Second Preferred Stock of The Higbee Company under the letterhead of "INDEPENDENT PREFERRED STOCKHOLDERS' COMMITTEE OF THE HIGBEE COMPANY." This letter merits careful examination. It begins with the following paragraph (R. 172):

"The undersigned constitute a Committee organized solely for the benefit of the Preferred Stockholders of The Higbee Company, and to prosecute certain objections to the Amended Plan of Reorganization dated September 27, 1940, filed for The Higbee Company."

The letter then outlines in some detail the objections which were asserted by Potts and Boag to the Bradley-Murphy claim, and recites some of the accomplishments obtained by Potts and Boag on behalf of all preferred stockholders since filing the original objections. Near the close of the letter will be found the following paragraphs (R. 178):

"If you desire any further information, please get in touch with this Committee. Without any obligation whatsoever, you may join in this fight to the finish, in order to get a better deal for the Preferred Stockholders of The Higbee Company."

"This Committee is, and will remain, absolutely independent of the far reaching influences of The Higbee Company management. In case you do not approve this plan, we will be glad to have you so advise us."

Potts was examined at length concerning this letter by Mr. Sherwood of The Securities and Exchange Commission at the hearing on the application of Potts for compensation held May 14, 1942 (Young Ex. 19, R. 185). It there appears that Potts received replies from preferred stockholders to the letter of July 10, 1941, that some of the stockholders "expressed a desire that the objections be prosecuted" and that the stockholders were never given notice that Potts and Boag had discontinued their representation of the interests of the stockholders. Under these circumstances, and in view of the strong and unequivocal language of the letter of July 10, the preferred stockholders were entirely reasonable in their reliance upon the good faith of Potts, an attorney in the proceedings, who had expressed his intention to prosecute the objections to final conclusion. Even Potts was aware of this because he gave the following testimony upon interrogation by Mr. Sherwood (R. 187):

"Q. As far as some of these people who wrote you were concerned though, they might reasonably have thought that the Independent Stockholders' Committee was still representing their interests and continuing in the course indicated in that letter of July 10?

A. That might be true."


On October 2, 1941 Potts and Boag filed objections and exceptions to the confirmation of the Amended Plan of Reorganization (Young Ex. 15, R. 178). In these objec-

tions Potts and Boag continued in their position that the Junior Indebtedness should not be allowed in the hands of Bradley and Murphy for the amounts set forth in the plan. With these objections, Potts and Boag requested and received leave of the court to refile their briefs which had originally been filed in connection with the earlier objections to approval of the plan (R. 181). One of the briefs so refiled was that which is quoted above at page 9 wherein Potts and Boag claimed to represent "a very large proportion of the stockholders." Thus Potts and Boag were continuing to represent stockholders and to take advantage of this representation in any way that they could before the court.

After the judgment of the District Court on October 17, 1941 confirming the plan Potts and Boag filed notice of appeal (Young Ex. 16, R. 181). In their statement of points (Young Ex. 17, R. 182) Potts and Boag, appellants, continued their vigorous opposition to the allocation in the plan of the new notes and common stock to the old Junior Indebtedness claimed by Bradley and Murphy. This was not, however, the only ground for appeal.

As a part of the record on appeal Potts designated his statement made at the hearing of December 18, 1940 (Young Ex. 18, R. 184) of which a portion was quoted *supra* on page 8. Thus Potts represented to the Circuit Court of Appeals that he was acting in a representative capacity in connection with the appeal on behalf of all stockholders.

Thus until the very sale of their stock Potts and Boag consistently held themselves out as being the champions of the rights of all preferred stockholders and as the actual representatives of a large number of them. This representation was made to the Master, to the District Court, to the Circuit Court of Appeals and to the preferred stockholders themselves.



Suddenly, however, Potts and Boag were confronted with an urgent desire upon the part of Bradley and Murphy to acquire the Potts and Boag stock. It became apparent that this stock then occupied a bargaining or nuisance value far in excess of intrinsic value. Potts and Boag could see great monetary gain to them if they could abandon the persons whom they were then representing and shift their position to that of individual litigants. After March 3, 1942 when the first contact was made by Bradley and Murphy, Potts and Boag quickly and without notice to any court or any shareholders shifted their position and asserted for the first time that they were acting in their individual interests and without regard for the interests of any other stockholders. The shift was purely a mental one as there were no outward manifestations. The persons whom they had so fervently represented prior to that time were suddenly abandoned and the appeal was sold out without any consideration being given to the interests of those theretofore represented.

On March 7, 1942 Bradley and Murphy purchased from Potts and Boag 260 shares of First Preferred Stock of the Debtor for a purchase price of \$115,000. The approximate market value of the shares on that date was \$15,000. The sale of the Potts and Boag stock to Bradley and Murphy was admittedly a sale of the appeal. This is conclusively established by the contract of sale (Young Ex. 26, R. 223) as well as the testimony of Potts (Young Ex. 19, R. 185) taken upon an examination by Mr. Sherwood of the Securities and Exchange Commission.

“Q. Will you tell us the circumstances under which that appeal was dismissed?

A. Well, Mr. Boag's stock and the stock in my name was sold to Messrs. Bradley and Murphy.

Q. For how much was it sold?

A. I don't mind answering it, but I will answer it under objection because it is entirely immaterial.

The Master: I think it is material in this proceeding and I think you may answer. Objection overruled.

A. The total amount was \$115,000.

Q. Was that paid in cash?

A. Most of it.

Q. How much of that amount was paid to Mr. Boag?

A. Twenty thousand dollars.

Q. And the balance to you?

A. Yes, sir. I want an objection and exception to all these questions.

Q. The total amount of stock that you and Mr. Boag sold to Mr. Bradley and to Mr. Murphy was 260 shares; is that correct?

A. That is correct.

Q. That would mean that it had a par value of \$26,000?

A. That is correct.

Q. Have you any idea what the market value of it was at that time?

A. From sixty to sixty-five.

Q. Have you any idea what induced anybody to pay \$115,000 for stock with a par value of \$26,000 and a market value considerably less?

A. I think there was a desire to end this litigation.

Q. So that in a sense you were selling something more than your stock, I take it?

A. I think so.

Q. You were selling the appeal which you had taken in behalf of yourself and Mr. Boag; that is a fair statement, isn't it?

A. I think so.

Q. Was the appeal, that you and Mr. Boag took, a part of the program that was outlined to the preferred stockholders in your letter of July 10?

A. It might have been a part of it. The objections, I think, confirmed what we said we would object to.

Q. Were there any other people interested in buying this stock at the time that you sold it to Mr. Bradley and to Mr. Murphy?

A. No; I don't think so.

Q. Mr. Young wasn't interested?

A. Apparently not."

Potts desired to make an even greater profit out of his position in Higbee so he filed an application for an allowance of compensation upon the theory that he had performed a great service on behalf of all stockholders. It must be remembered that this was after the sale of his stock—and the appeal—to Bradley and Murphy but before anyone had suggested that he should account for the bonus he had theretofore received. At the hearing on his application, Potts was interrogated about the "Independent Preferred Stockholders' Committee" which he had theretofore formed. The following is an excerpt from his testimony (R. 185-6):

"Q. Now, after you left the New Preferred Stockholders' Committee you formed another committee, didn't you?

A. I don't know as you could call it another committee. We didn't do anything about forming another committee until after the plan was approved, I think, July 2, 1941.

Q. What did you do then?

A. Sent out a letter to the stockholders.

Q. What was the letterhead?

A. Independent Stockholders' Committee.

Q. And the signature to that communication was also Independent Preferred Stockholders' Committee, wasn't it?

A. That is right.

Q. By whom?

A. Boag, Joecken and Potts.

Q. So that you represented at least that a new Preferred Stockholders' Committee had been formed, did you not?

A. That is right.

Q. What became of that committee?

A. Well, after the plan was confirmed Mr. Boag and Mr. Potts were the only ones that were willing to press our objections any further and that probably was the end of the committee other than whatever was left of it represented by Boag and Potts.

Q. Well, now, did you receive any replies to this communication that you sent out on the letterhead of the Independent Preferred Stockholders' Committee?

A. A few, yes.

Q. Did any of the stockholders who replied express any interest in having this committee represent them?

A. Well, some of them expressed a desire that the objections be prosecuted.

Q. Were they ever given any notice that this committee had been dissolved?

A. No; they weren't."

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"Q. Was the appeal, that you and Mr. Boag took, a part of the program that was outlined to the preferred stockholders in your letter of July 10?

A. It might have been a part of it. The objections, I think, confirmed what we said we would object to."

At that hearing Mr. Sherwood of the Securities and Exchange Commission stated the position of the Commission as follows (R. 192):

"It is perfectly plain from Mr. Potts' testimony that he was not only selling the stock, he was selling an appeal, and it can be drawn from that testimony that other people than Mr. Potts and Mr. Boag were interested in that appeal. Whether we call it a class action, anything that resulted from that appeal, except selling it in this way, would have inured to the benefit or the detriment, however it might work out, of the whole class of stockholders.

"I don't think that this Court should be called upon to approve a transaction involving the sale of an appeal, which is what, to a substantial extent, this amounts to. It was also, of course, a sale of stock.

It seems to me that where others are interested in an appeal the sale of the appeal in that way is an unconscionable action.

"One other thing. The action of the Circuit Court of Appeals in dismissing this appeal does not necessarily force the conclusion that the Court concluded that it was an individual appeal and that others were not interested in it. * * * Under these circumstances, it may well be that in some other Court, at some other time, some or all of the preferred stockholders, including those who may have thought that Mr. Potts, in sending out a letter on the letterhead of the Independent Preferred Stockholders' Committee, was representing their interests, have some right to an accounting for what Mr. Potts cleared in this transaction over and above the fair value of the stock that he sold."

The Master also expressed his views in his report recommending denial of any compensation to Potts, and denial of an application which Potts had filed requesting approval of the sale to Bradley and Murphy (Young Ex. 20, R. 194, 195):

"The testimony of Potts is that he did not consider the sale price of his stock to contain any compensation for services rendered by him in the proceeding, although such recovery was realized in the course of the settlement of the appeal. In such recovery the preferred stockholders, including those who responded to his appeal for support, have not shared although obviously they would have shared in any benefits which might have accrued if the appeal had been successfully prosecuted to a conclusion."

Potts took exceptions to the report of the Special Master recommending denial of compensation (Young Ex. 21, R. 198), and in his brief in support of the objections and exceptions (Young Ex. 22, R. 199) he reverts once again to his contention that he was representing the interest of all of the preferred stockholders. Thus he says in his brief (R. 203):

“Applicant J. Fred Potts fought for the above amendments and we submit that those accomplishments which inured to the benefit of all the First Preferred Stockholders, don’t reflect that Mr. Potts was looking after his own interests alone. We don’t deny that Mr. Potts was looking after his family’s interest in Higbee. He spent his own money and gave of his time freely for several years as a member of the New Preferred Stockholders Committee without the slightest hope of being reimbursed or compensated, and that is more than can be said for Messrs. Bloomfield and Orr who now accuse Potts of having had nobody’s interest at heart but his own.”

Thus we see that Potts shifted his position back again and once more claims to be the champion of the interests of preferred stockholders other than himself.

Potts’ application for compensation from the Debtor’s estate was disapproved for the reason, among others, that the sale of his stock had not been approved by the court as was required by Chapter X, Section 249 of the Bankruptcy Act. Thereupon Potts filed an application for approval of the sale to Bradley and Murphy and the Master also recommended that this be denied (Young Ex. 20, R. 194).

The Securities and Exchange Commission filed a memorandum with the District Court opposing the applications of Potts for compensation and for approval of the sale to Bradley and Murphy (Young Ex. 24, R. 216). The District Court filed its memorandum on September 3, 1942 adopting the recommendations of the Master and thus refusing to allow Potts any compensation or to approve the sale of the Potts and Boag stock to Bradley and Murphy. The Court, after reciting the facts of the sale, stated the following (Young Ex. 25, R. 220):

“There is no justifiable basis in these circumstances upon which the Court could bottom its approval of the settlement sale of this stock, nor does there appear any just reason for allowing compensation to these appli-

cants upon the theory that they performed services beneficial to the estate or in furtherance of the reorganization. The plain fact is that no such additional burden should be imposed upon the debtor and its creditors and shareholders who accepted the plan, and this is so independently of the prohibition of Section 249 of the Bankruptcy Act. The clear purpose and implications of that provision are sufficient to support rejection, but the bankruptcy court's powers, quite aside from that section are adequate to deny any such approval or allowance. I think that the Master's report and the brief of the Securities and Exchange Commission fully and adequately respond to the application for approval of the settlement sale, as well as to the application for compensation. Nothing is to be gained by a restatement of the ground for denial of both applications. Upon the conceded facts, I can find no ground upon which to sustain the exceptions to the Master's report, and they are accordingly denied and the report confirmed."

Thus the District Court refused to approve the sale.

ARGUMENT.

The foregoing constitute the essential facts which should be considered by the court in this case. The Master went far outside of the record in his discussion, most of which seems totally irrelevant to the issues presented in the case. Young has instituted this proceeding because he feels, as does the Securities and Exchange Commission, that the preferred stockholders of Higbee suffered a serious wrong when their representatives "sold" the appeal. Young can gain nothing from recovery in this case except a small amount which would inure to a few shares of preferred stock which he owns. Yet the Master devoted most of his report to a new discussion of the history of the Ball sale to the Young syndicate, the subsequent Ball sale to Bradley and Murphy of the Higbee securities and ensuing litigation. All this has nothing to do with the question of whether Potts and Boag are or are not entitled to keep the

bonus they received when they sold out the interests of the hundreds of Higbee preferred stockholders.

It has been demonstrated above that Potts and Boag stated to all concerned that they were acting on behalf of stockholders generally and not just for themselves. The very nature of their objections was such that had they successfully litigated them to conclusion, the benefits would have inured to the Debtor and all preferred stockholders. The principal objection asserted was that the Bradley-Murphy claim either be eliminated as an indebtedness or greatly reduced. Obviously the Debtor would have benefited by the reduction in its total debt which Potts and Boag were endeavoring to bring about. The very nature therefore of the claim asserted was one calculated to benefit not just Potts and Boag, but the Debtor and all preferred stockholders. It was a claim which could not be asserted by a single stockholder solely on his own behalf whether he claimed to represent others or not.

In this respect the situation is analogous to a stockholder's suit wherein a single stockholder sues to recover assets which he claims rightfully belong to the corporation. This type of suit can be brought only in the interest of the corporation whether or not the stockholder bringing it purports to be acting alone or in a representative capacity.

The situation here goes even further. Bradley and Murphy were in control of the policies of the Debtor. They were also asserting large claims against it. Debtor's attorneys for years never filed objections to these claims although Potts and Boag did so as early as 1938. Potts and Boag bitterly complained of the failure by Debtor's attorneys to file appropriate objections. They thus admitted that the objections should properly be made on behalf of the Debtor and that the Debtor and its preferred stockholders were the true parties interested.

As was stated in *Alexander v. Quality Leather Goods Corp.*, 269 N. Y. Supp. 499 (Sup. Ct. N. Y. 1934):

"When a minority stockholder brings an action on behalf of himself and on behalf of other stockholders similarly situated, he exercises a derivative right and judgment must ordinarily be rendered in favor of the corporation, though the corporation be a defendant in the action."

Similarly in *Curtiss v. Wilmarth*, 254 Mich. 242, 236 N. W. 773 (Sup. Ct. Mich. 1931), the court discussed the nature of an action by a stockholder saying:

"A suit by a stockholder is in fact a suit by the corporation to redress a wrong to the corporation, and the relief granted belongs to the corporation and not to the stockholder individually. He is not entitled to the money recovered. That goes to the corporation and not to the individual complainants."

Bradley and Murphy as claimants to the old junior notes were interested in a plan of reorganization which would give them the largest participation possible in the reorganized company. Similarly the preferred stockholders were interested in obtaining as large a participation as possible. The plan provided for \$600,000 of notes to go to the old junior debt together with the majority of the common stock. Bradley and Murphy paid members of a preferred stockholders' committee a bonus of \$100,000 in order to see this plan go through. Perhaps the parties to the transaction felt that they could avoid scrutiny because representation of stockholders generally in matters of this kind is less definite and concrete than the usual representation by an attorney of a single party litigant. However, for that very reason, if for none other, the court should more closely scrutinize the transaction so that the rights of the poorly represented stockholders will be amply protected. The making of a deal of this kind with the attorney and representative of stockholders is no less

subject to criticism and appropriate court action than would be a payment by a litigant to the attorney for his adversary to cause the attorney to discontinue the litigation.

If the proceeds of the Potts and Boag appeal would have inured to the Debtor and its First Preferred Stockholders then the proceeds of the settlement of that appeal should likewise inure to the benefit of the Debtor and its First Preferred Stockholders. There is no logical distinction between the proceeds of the litigation itself and the proceeds of the settlement of litigation. A decree directing Potts and Boag to turn over the \$100,000 bonus is the proper remedial device.

The instant case is a flagrant example of misconduct. Potts and Boag were members of two committees. They solicited the right to represent all stockholders (R. 172-8). They urged upon the court that they represented stockholders generally. They urged meritorious objections to the plan on behalf of all stockholders. Bradley and Murphy, fearing that Potts and Boag would successfully bring about a great reduction in, or elimination of, their claim with subsequent advantages to the preferred stockholders, paid the price for settlement, knowing full well that the payment would remain in the pockets of Potts and Boag and would not reach those they represented by any voluntary route. It is time here that the Court condemn this trafficking in litigation with all of its ramifications and the inherent evils which arise as a result of the possibility of such conduct. To permit a sale of an appeal under these circumstances, and thus create a precedent, would be a serious blow to the subsequent fair and ethical conduct of corporate reorganization proceedings.

Even more serious is the instant situation where the payment was made in such a manner that a final adjudication resulted, thus preventing any other security holder from presenting the matter for a judicial determination. Potts and Boag appealed from a judgment of the District

Court. After the time within which any others could bring an appeal the payment was made under a contract (R. 223) which specifically provided for the dismissal of the appeal. To the knowledge of all parties concerned, no appeal by any other was then possible. Thus did the matter result in a final adjudication without any hearing on the merits. Surely under these circumstances the preferred stockholders are entitled to the proceeds of the settlement of the litigation brought on their behalf.

The duty of the Court is to protect these security holders who were so poorly represented. In *Gruenwald v. Moir Hotel Co.*, 96 Fed. (2) 932 (C. C. A. 7, 1938), the court said:

"Under the Bankruptcy Act, the bondholders' committee, the depository and its officers were all subject to the jurisdiction of the District Court in the reorganization proceedings."

Similarly in *Steere v. Baldwin Locomotive Works*, 98 Fed. (2) 889 (C. C. A. 3rd, 1938), the court said:

"In the case of most corporations requiring reorganization the holdings of many security holders are too small to make possible independent action for their own protection. This has brought about the formation of committees for their protection. The history of corporate reorganizations before the adoption of Section 77B reveals too many instances of committees, often self constituted, formed ostensibly to protect security holders but actually serving their own or other private interests at the expense of those they were appointed to serve. One of the purposes of the Bankruptcy Act as amended is to assure such security holders that, so far as the court is able to ascertain after hearing, any committee permitted to intervene in their behalf is composed of able and honest individuals who are free of conflicting interests and reasonably representative, and may, therefore, reasonably be expected adequately to protect their interests. The act seeks to assure such representation by authorizing such committees to be adequately compensated out of the debtor corporation's

estate for constructive services rendered in assistance of the formulation and accomplishment of a fair and reasonable plan of reorganization. It should be administered in the light of these underlying purposes."

Surely the rule as stated in the *Steere* case is a most salutary one. Widely distributed security holders must look to the court for guidance and protection. Potts and Boag were guided purely by selfish motives in the conclusion of their sale to Bradley and Murphy. They abandoned those whom they were representing. We submit that this Court should hear and determine the merits of this case. It presents an important question of administration in bankruptcy proceedings which is left in a highly unsatisfactory state by the decision of the Circuit Court.

STATEMENT REGARDING BRADLEY AND MURPHY.

Messrs. Bradley and Murphy were parties to the proceedings below. They were both directors and Bradley was President of Higbee at the time of the transaction complained of. It was felt that they should be secondarily liable if Potts and Boag were unable to respond to a judgment rendered against them, the theory being that as fiduciaries, if Bradley and Murphy intended to make concessions to effectuate the Plan of Reorganization, these concessions whether in the form of cash payments or otherwise should have been made to all stockholders and not just to Potts and Boag. However, the lower Courts have held that Bradley and Murphy, having paid the price to Potts and Boag once, should not be required to pay it again. Petitioner has decided to acquiesce in this determination. Consequently Bradley and Murphy have not been made respondents in this Petition.

STATEMENT REGARDING WILLIAM W. BOAG.

During the course of the appeal in the Circuit Court of Appeals it first came to Petitioner's attention that Respondent Boag had entered the Armed Services. No one representing Boag has appeared to request a stay of proceedings pending his return. However, Petitioner has no desire to cause judgment to be entered against Boag under these circumstances. It would be entirely satisfactory to have the proceedings stayed as to Boag pending his return. No similar disability exists respecting Respondent Petts who was the major participant in the transaction and who derived the major part of the profit from it.

OPINIONS BELOW.

The opinion of the District Court was not published. It appears in the record at page 252. The Circuit Court of Appeals did not render an opinion but merely issued an order approving the judgment of the District Court. This order has not yet been published, but copies thereof have been appended to the record.

CONCLUSION.

WHEREFORE, Petitioner respectfully prays the issuance of a Writ of Certiorari.

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In the Supreme Court of the United States

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REPLY BRIEF OF PETITIONER.

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J. F. POTTS,
Respondents.

REPLY BRIEF OF PETITIONER.

The brief of Respondent Potts raises two questions for consideration by this Court.

FIRST, It is said that Bradley and Murphy paid the inflated price to Potts because of developments which occurred in other litigation to which Young was a party.

The fiduciary relationship arose when Potts made representations and gave assurances to the court and the preferred stockholders. The circumstances or motives which later impelled Bradley and Murphy to negotiate to acquire Potts' stock, and thus persuade him to ignore his earlier representations and assurances, could not provide any justification for Potts to violate the obligations incident to the relationship which had been created. In

fact the more valuable Potts' position became, the more strict should have been his observance of the rules and principles relating to fiduciary faithfulness.

SECOND, It is said that because the courts below found that Potts and his colleague Boag were acting only on their own behalf this Court cannot give relief.

At page 3 of the Petition for Writ, Petitioner agreed with the findings that Potts and Boag were acting for themselves only. It is abundantly clear that all of their activity throughout the reorganization proceedings was for the sole purpose of fostering their own selfish interests despite their oft repeated statements to the contrary. Had they been sincere when they announced in court to all concerned that they were representing the preferred stockholders as a class, they would have voluntarily turned over the proceeds of the litigation to the class.

Petitioner here is merely seeking to require Potts to live up to his own solemn representations—both spoken and written.

May an attorney appear in a bankruptcy proceeding asserting that he represents a class of stockholders, and at the last minute—when it suits his pocketbook—change his position and claim to be representing himself only, thereby to retain the proceeds of a final settlement of litigation? That is the question which will be presented if the Petition for a Writ is granted. It is a question of the conduct of parties in a bankruptcy proceeding—parties over whom the Federal Court has unquestioned jurisdiction. Trafficking in litigation by members of a stockholders' committee and their attorney is a matter of importance to the administration of bankruptcy proceedings everywhere.

WHEREFORE Petitioner respectfully requests the issuance of a Writ of Certiorari as prayed in the Petition.

Respectfully submitted,

JAMES A. BUTLER,

Bulkley Building,
Cleveland, Ohio,

ROBERT W. PURCELL,

Terminal Tower,
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*Attorneys for Petitioner,
Robert R. Young.*

(Note: Since the filing of the Petition for Writ of Certiorari, the order of the Circuit Court of Appeals has been published and appears at 142 Fed. (2) 1004.)

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In the Supreme Court of the United States

OCTOBER TERM 1944.

No. 342.

In the Matter of

THE HIGBEE COMPANY, *Debtor*

} Bankruptcy No. 36,119.

ROBERT R. YOUNG,

Petitioner,

vs.

THE HIGBEE COMPANY,

WILLIAM W. BOAG and

J. F. POTTS,

Respondents.

BRIEF OF PETITIONER.

JAMES A. BUTLER,

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BRIEF OF PETITIONER.

(A) REPORT OF OPINIONS BELOW.

The opinion of the District Court was not published. It appears in the record at page 252. The order of the Circuit Court of Appeals approving the judgment of the District Court is reported at 142 Fed. (2) 1004. It appears in the record at page 264.

(B) JURISDICTIONAL GROUNDS.

On October 9, 1944 this Court granted Petition for Writ of Certiorari to the Circuit Court of Appeals for the Sixth Circuit. The Writ was sought pursuant to the provisions of Judicial Code Section 240, as amended (28 U. S. C. A. 347).

(C) STATEMENT OF THE CASE.

This is a controversy arising out of the corporate reorganization proceedings of The Higbee Company pursuant to Chapter X of the Bankruptcy Act. Petitioner was, at the time of the transaction involved, a holder of First Preferred Stock of The Higbee Company, Debtor. Petitioner still holds the securities which pursuant to the Plan of Reorganization were issued in respect of those shares.

Respondents Potts and Boag owned 250 shares and 10 shares, respectively, of the First Preferred Stock of Higbee. They organized and were members of a Preferred Stockholders Committee and objected to the Plan of Reorganization for Higbee, principally upon the ground that certain large claims (generally referred to as the "junior indebtedness") which were asserted against Higbee by one C. L. Bradley and one J. P. Murphy, were invalid, or should be materially reduced, and that the distribution of new securities to the junior indebtedness, which was provided by the Plan, was excessive and, therefore, unfair to preferred stockholders. The District Court confirmed the Plan, and Potts and Boag, under the circumstances which will be described in more detail below, appealed to the Circuit Court of Appeals for the Sixth Circuit from the order of confirmation.

The litigation, involving the contentions of Potts and Boag, took place over a period of almost four years—from 1938 to 1942. During this period first as the "New Preferred Stockholders Committee" and later as the "Independent Preferred Stockholders Committee," Potts and Boag openly declared themselves to be representing and acting in the interests of the preferred stockholders generally of Higbee. Representations of this character were made to the Court and by circularization to the stockholders.

Messrs. C. L. Bradley and J. P. Murphy were Directors of Higbee, and Bradley was its President. As the legal owners of the junior indebtedness, they had filed claims against Higbee and were, naturally, interested in receiving the benefit of the liberal treatment which the Plan accorded to these claims.

Obviously, a direct conflict of interest between Potts and Boag, who were representing the interests of the preferred stockholders, and Bradley and Murphy, who were pressing their individual interests, was created.

On March 7, 1942 Bradley and Murphy, being anxious that the Plan be approved, paid Potts and Boag \$115,000 for their shares which then had a current market value of approximately \$15,000. By an express provision in the contract of sale Bradley and Murphy succeeded to the rights of Potts and Boag in the appeal (R. 223). They forthwith caused the dismissal of the appeal and consequent final confirmation of the Plan of Reorganization, thus avoiding a determination by the Circuit Court of the merits of the questions raised by the appeal. Potts himself characterized the transaction as "selling the appeal." (R. 188)

It is the contention of Petitioner that this transaction was wrongful because it was done by persons occupying a fiduciary capacity, and because it deprived their beneficiaries of an adjudication of important legal questions pertaining to substantive rights. Consequently an order was prayed below directing Potts and Boag to turn over to The Higbee Company for the sole benefit of its first preferred stockholders the \$100,000 bonus which they received, that being the difference between the fair market value of the securities sold to Bradley and Murphy and the price received.

QUESTIONS PRESENTED.

1—After Potts and Boag had represented to the Court and to the Higbee preferred stockholders that they were acting as a committee in the interests of all preferred stockholders, can they thereafter accept and retain for themselves individually a \$100,000 consideration for permitting the dismissal of an appeal which they had taken from a decree confirming the Amended Plan of Reorganization of The Higbee Company?

2—Should Potts and Boag be required to pay over to The Higbee Company for its First Preferred Stockholders the aforesaid \$100,000 consideration which they received for permitting the dismissal of the appeal?

(D) SPECIFICATION OF ERRORS.

1. The Lower Court erred in failing to hold that under the admitted facts Potts and Boag violated their obligations to the preferred stockholders of The Higbee Company by "selling" their appeal from the order of the District Court which had approved the Higbee plan of reorganization.

2. The Lower Court erred in failing to order Potts and Boag to pay over to The Higbee Company for the benefit of its preferred stockholders the difference between the fair market price of their 260 shares of First Preferred Stock of The Higbee Company on March 7, 1942, and the price which Bradley and Murphy paid Potts and Boag for said shares.

3. The Special Master erred in making and the District Court erred in approving Master's findings Nos. 1, 2, 3, 4, 5, 6, 7, 17, 23, 39, 40, and 41, as there is no evidence whatever in the record in support thereof or bearing thereon.

(E) ARGUMENT.

SUMMARY OF ARGUMENT.

(1) The litigation instituted by Potts and Boag was analogous to a representative suit, the proceeds of which in this instance should be paid to The Higbee Company for the benefit of the stockholders whom they were supposed to be representing, the settlement of the litigation being fundamentally the same as a successful prosecution thereof.

(2) Members of a Stockholders' Committee owe fiduciary obligations to the stockholders they represent and may not change their status or abandon the interest of those they represent, at least without notice.

THE FACTS.

Activities of "New Preferred Stockholders' Committee."

At all times after 1937 C. L. Bradley and J. P. Murphy were asserting large claims against Higbee—claims aggregating over \$1,500,000—based on certain promissory notes (referred to as the junior indebtedness) which they had purchased from George and Frances Ball Foundation for \$600,000 at a time when Bradley was a director of Higbee. (R. 229.)

During the years 1938 through 1940, Respondents Potts and Boag were members of the "New Preferred Stockholders' Committee" and as such were objecting to the allowance of the claims filed by Bradley and Murphy on the grounds that the junior indebtedness was not a valid debt of Higbee, but should be considered a capital advance; or in the alternative that Bradley and Murphy should not be permitted to claim against Higbee for an amount larger than the purchase price to Bradley and Murphy of the junior notes (Young Ex. 1, R. 81, offered R. 10).

The extent of the controversy and the bitterness with which the divergent points of view were asserted appear in a brief which was filed by Potts and Boag, acting as

the New Preferred Stockholders Committee, on December 15, 1938 (Young Ex. 2, R. 88, offered R. 10). Messrs. Bradley and Murphy attacked the Potts group as not constituting a bona fide Committee. In defense of their position, the brief of the Committee stated:

"This committee contends and expects to prove that these gentlemen (Bradley and Murphy) bought this claim for about thirty cents on the dollar during the reorganization proceedings and while in a fiduciary position towards the debtor and its Preferred Stockholders, thereby attempting to make a profit for themselves of \$1,200,000 on the transaction." (R. 92.)

.

"Mr. Fackler (attorney for Bradley and Murphy) wants a 'friendly' committee, a committee which he can handle, and a committee which will think not so much of protecting the rights of the Preferred Stockholders, but other interests as well. We do not represent any other interests and no individual member of our committee represents any other interests, and any such statement is false. No such testimony was submitted, and no such testimony could be submitted. If Mr. Fackler sees something yellow, it is due to his own jaundiced eye and not based upon any existing fact. Mr. Fackler makes the statement that our committee was organized for the purpose of 'hindering and obstructing' the reorganization. Not a shred of proof is in the record to support any such malicious statement. If this committee has hindered and obstructed anything at all, it has hindered and obstructed a scheme on the part of Mr. Fackler's clients, Charles L. Bradley and John P. Murphy, to make a profit of \$1,200,000 on a transaction involving Mr. Bradley's own company, while seeking reorganization under the provisions of 77B of the Bankruptcy Act, to which profit we contend they are not in equity and good conscience entitled." (R. 93-4.)

.

"The committee contends that, under the scrutiny clause of the Reorganization Act, and supported by

other authorities, the very outside limit that should be allowed Bradley and Murphy on their claim is the consideration they actually paid for it." (R. 95.)

By December 18, 1940 Potts and Boag had resigned from the then existing stockholders' committee. On that day there was a hearing before the Special Master on the Amended Plan of Reorganization and at such hearing Potts announced to the court that he was forming a new stockholders' committee to continue objections to the Plan and to make an application to the court for the appointment of disinterested counsel, as he was then asserting that it was unfair to the preferred stockholders for counsel then acting for the Debtor to continue to do so in view of their reluctance to object to the Bradley-Murphy claims. On that occasion Potts stated to the Master as follows (Young Ex. 18, R. 185, offered R. 12):

"A new stockholders' committee will be formed, and whether or not we call it a new new stockholders' committee, I don't know, but it will have to be given some name so that we can differentiate it from the other stockholders' committee, and I think, after talking with Mr. Ewing, that the objections can be consolidated so that you will have to deal with just one committee in the very near future."

Activities of "Independent Preferred Stockholders' Committee."

Pursuant to the notification given to the Master, Potts and Boag organized the "Independent Preferred Stockholders' Committee." Immediately they filed an application for the appointment of special counsel and a brief in support thereof (Young Ex. 5, R. 112, offered R. 10, Ex. 6, R. 115, offered R. 10), urging that the apparent disinclination of the then attorneys for the debtor to object to the junior indebtedness claims of Bradley and Murphy disqualified them. In their brief on this question, Potts

and Boag, as the new Independent Preferred Stockholders Committee, stated the following:

"The fact that Mr. Bradley has been a Director of The Higbee Company since 1933, and the fact that Mr. Murphy has been a Director of The Higbee Company since 1937, and the fact that Mr. Bradley has been President of The Higbee Company since September 1937, and no doubt as Chief Executive of said Company has had the power to retain and remove legal representation, have unquestionably influenced Attorney Abbott in his failure to resist in any respect the Junior Debt in the hands of Messrs. Bradley and Murphy." (R. 117.)

Respondents next filed objections to the Plan (Young Ex. 4, R. 104, offered R. 10) which were overruled by the Master. They then filed exceptions to the Master's action (Young Ex. 7, R. 121, offered R. 10) and thus continued their opposition to the allowance of the Bradley-Murphy claims and to the treatment thereof provided by the Plan.

A reply brief of Potts and Boag (Young Ex. 9, R. 146, offered R. 11) was submitted to the court in answer to the Debtor's brief which argued in support of the Master's report. This reply brief makes the following very significant statement (R. 147):

"SECOND, it has been stated that objectors own and therefore represent only 260 shares of Higbee First Preferred. While we believe that the owner of a single share has as much right to be heard as the owner of many shares, we wish to point out to the court that objectors were originally members of the New Preferred Stockholders' Committee; that objectors resigned from said committee in protest over the unauthorized action of its counsel in approving this Plan. The representation which said New Preferred Stockholders' Committee now claims was acquired mainly through the presence on such Committee of Messrs. Potts and Boag, the present objectors, and it is now a fact that a very large proportion of the stockholders which the New Preferred Stockholders' Committee

claims to represent actually look to these objectors for the protection of their interest. The two remaining members of that committee are the owners of 10 shares of Preferred Stock each." (Emphasis added.)

On July 10, 1941 Potts and Boag sent a letter (Young Ex. 14, R. 172, offered R. 12) to all of the holders of First and Second Preferred Stock of The Higbee Company under the letterhead of "INDEPENDENT PREFERRED STOCKHOLDERS' COMMITTEE OF THE HIGBEE COMPANY." This letter merits careful examination. It begins with the following paragraph (R. 172):

"The undersigned constitute a Committee organized solely for the benefit of the Preferred Stockholders of The Higbee Company, and to prosecute certain objections to the Amended Plan of Reorganization dated September 27, 1940, filed for The Higbee Company."

The letter then outlines in some detail the objections which were asserted by Potts and Boag to the Bradley-Murphy claim, and recites some of the accomplishments obtained by Potts and Boag on behalf of all preferred stockholders since filing the original objections. Near the close of the letter will be found the following paragraphs (R. 178):

"If you desire any further information, please get in touch with this Committee. Without any obligation whatsoever, you may join in this fight to the finish, in order to get a better deal for the Preferred Stockholders of The Higbee Company.

"This Committee is, and will remain, absolutely independent of the far reaching influences of The Higbee Company management. In case you do not approve this plan, we will be glad to have you so advise us."

Potts was examined at length concerning this letter by Mr. Sherwood of The Securities and Exchange Commission at the hearing on the application of Potts for compensation held May 14, 1942 (Young Ex. 19, R. 185, offered R. 12). It there appears that Potts received replies from

preferred stockholders to the letter of July 10, 1941, that some of the stockholders "expressed a desire that the objections be prosecuted" and that the stockholders were never given notice that Potts and Boag had discontinued their representation of the interests of the stockholders. Under these circumstances, and in view of the strong and unequivocal language of the letter of July 10, the preferred stockholders were entirely reasonable in their reliance upon the good faith of Potts, an attorney in the proceedings, who had expressed his intention to prosecute the objections to final conclusion. Even Potts was aware of this because he gave the following testimony upon interrogation by Mr. Sherwood (R. 187):

"Q. As far as some of these people who wrote you were concerned though, they might reasonably have thought that the Independent Stockholders' Committee was still representing their interests and continuing in the course indicated in that letter of July 10?

A. That might be true."

On October 2, 1941 Respondents filed objections and exceptions to the confirmation of the Amended Plan of Reorganization (Young Ex. 15, R. 178, offered R. 12). In these objections Potts and Boag continued in their position that the junior indebtedness should not be allowed in the hands of Bradley and Murphy for the amounts set forth in the plan. With these objections, Potts and Boag requested and received leave of the court to refile their briefs which had originally been filed in connection with the earlier objections to approval of the plan (R. 181). One of the briefs so refiled was that which is quoted above at page 8 wherein Potts and Boag claimed to represent "a very large proportion of the stockholders." Thus Potts and Boag were continuing to represent stockholders and to take advantage of this representation in any way that they could before the court.

After the judgment of the District Court on October 17, 1941 confirming the plan, Respondents filed notice of appeal (Young Ex. 16, R. 181, offered R. 12), and in the appeal continued their vigorous opposition to the allocation in the plan of the new notes and common stock to the old junior indebtedness claimed by Bradley and Murphy. This was not, however, the only ground for appeal.

As a part of the record on appeal Potts designated his statement made at the hearing of December 18, 1940 (Young Ex. 18, R. 184, offered R. 12) of which a portion was quoted *supra* on page 7. Thus Potts represented to the Circuit Court of Appeals that he was acting in a representative capacity in connection with the appeal on behalf of all stockholders.

Thus until the very sale of their stock Potts and Boag consistently held themselves out as being the champions of the rights of all preferred stockholders and as the actual representatives of a large number of them. This representation was made to the Master, to the District Court, to the Circuit Court of Appeals and to the preferred stockholders themselves.

The "Sale" of the Appeal by Potts and Boag.

Suddenly, however, Potts and Boag were confronted with an urgent desire upon the part of Bradley and Murphy to acquire the Potts and Boag stock. It became apparent that this stock had acquired a bargaining or nuisance value far in excess of intrinsic value. Potts and Boag could see great monetary gain to them if they could abandon the persons whom they were then representing and shift their position to that of individual litigants. After March 3, 1942 when the first contact was made by Bradley and Murphy, Potts and Boag quickly and without notice to any court or any shareholders shifted their position and asserted for the first time that they were acting in their individual interests and without regard for the

interests of any other stockholders. The shift was purely a mental one as there were no outward manifestations. The stockholders whom they had so fervently represented prior to that time were suddenly abandoned and the appeal was sold out without any notice whatever.

On March 7, 1942 Bradley and Murphy purchased from Potts and Boag their 260 shares of First Preferred Stock of the Debtor for a purchase price of \$115,000. The approximate market value of the shares on that date was \$15,000. The sale of the Potts and Boag stock to Bradley and Murphy was admittedly a sale of the appeal. A written contract of sale was executed (Young Ex. 26, R. 223, offered R. 13) which brazenly called for the purchase of the appeal in the following language:

"I, (J. Fred Potts) hereby sell, assign, transfer and set over unto Charles L. Bradley and John P. Murphy, and their assigns, 260 shares of First Preferred Stock of The Higbee Company, of Cleveland, Ohio, 250 of which said shares are owned by me and 10 shares are owned by William W. Boag, whose attorney I am with full power to act on his behalf, together with all rights, title and interest, benefits or privileges we, or either of us, have or may have in and to or by virtue of or arising from the matter of The Higbee Company, Debtor, J. Fred Potts and William W. Boag, Appellants, vs. The Higbee Company, Appellee, and a certain appeal taken by J. Fred Potts and William W. Boag in said proceedings, which said appeal is now pending in the United States Circuit Court of Appeals for the Sixth Circuit * * *." (R. 223.)

Events Subsequent to the "Sale" of the Appeal.

The transaction was subsequently described in the testimony of Potts (Young Ex. 19, R. 188, offered R. 12) taken upon an examination by Mr. Sherwood of the Securities and Exchange Commission:

"Q. Will you tell us the circumstances under which that appeal was dismissed?

A. Well, Mr. Boag's stock and the stock in my name was sold to Messrs. Bradley and Murphy.

Q. For how much was it sold?

A. I don't mind answering it, but I will answer it under objection because it is entirely immaterial.

The Master: I think it is material in this proceeding and I think you may answer. Objection overruled.

A. The total amount was \$115,000.

Q. Was that paid in cash?

A. Most of it.

Q. How much of that amount was paid to Mr. Boag?

A. Twenty thousand dollars.

Q. And the balance to you?

A. Yes, sir. I want an objection and exception to all these questions.

Q. The total amount of stock that you and Mr. Boag sold to Mr. Bradley and to Mr. Murphy was 260 shares; is that correct?

A. That is correct.

Q. That would mean that it had a par value of \$26,000?

A. That is correct.

Q. Have you any idea what the market value of it was at that time?

A. From sixty to sixty-five.

Q. Have you any idea what induced anybody to pay \$115,000 for stock with a par value of \$26,000 and a market value considerably less?

A. I think there was a desire to end this litigation.

Q. So that in a sense you were selling something more than your stock, I take it?

A. I think so.

Q. You were selling the appeal which you had taken in behalf of yourself and Mr. Boag; that is a fair statement, isn't it?

A. I think so.

Q. Was the appeal, that you and Mr. Boag took, a part of the program that was outlined to the preferred stockholders in your letter of July 10?

A. It might have been a part of it. The objections, I think, confirmed what we said we would object to.

Q. Were there any other people interested in buying this stock at the time that you sold it to Mr. Bradley and to Mr. Murphy?

A. No; I don't think so.

Q. Mr. Young wasn't interested?

A. Apparently not."

Potts desired to make an even greater profit out of his position in Higbee so he filed an application for an allowance of compensation upon the theory that he had performed a great service on behalf of all stockholders. It must be remembered that this was after the sale of his stock—and the appeal—to Bradley and Murphy but before anyone had suggested that he should account for the bonus he had theretofore received. At the hearing on his application, Potts was interrogated about the "Independent Preferred Stockholders' Committee" which he had theretofore formed. The following is an excerpt from his testimony (R. 185-6 and 188).

"Q. Now after you left the New Preferred Stockholders' Committee you formed another committee, didn't you?

A. I don't know as you could call it another committee. We didn't do anything about forming another committee until after the plan was approved, I think, July 2, 1941.

Q. What did you do then?

A. Sent out a letter to the stockholders.

Q. What was the letterhead?

A. Independent Stockholders' Committee.

Q. And the signature to that communication was also Independent Preferred Stockholders' Committee, wasn't it?

A. That is right.

Q. By whom?

A. Boag, Joecken and Potts.

Q. So that you represented at least that a new Preferred Stockholders' Committee had been formed, did you not?

A. That is right.

Q. What became of that committee?

A. Well, after the plan was confirmed Mr. Boag and Mr. Potts were the only ones that were willing to press our objections any further and that probably was the end of the committee other than whatever was left of it represented by Boag and Potts.

Q. Well, now, did you receive any replies to this communication that you sent out on the letterhead of the Independent Preferred Stockholders' Committee?

A. A few, yes.

Q. Did any of the stockholders who replied express any interest in having this committee represent them?

A. Well, some of them expressed a desire that the objections be prosecuted.

Q. Were they ever given any notice that this committee had been dissolved?

A. No; they weren't."

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"Q. Was the appeal, that you and Mr. Boag took, a part of the program that was outlined to the preferred stockholders in your letter of July 10?

A. It might have been a part of it. The objections, I think, confirmed what we said we would object to."

At that hearing Mr. Sherwood of the Securities and Exchange Commission stated the position of the Commission as follows (R. 192):

"It is perfectly plain from Mr. Potts' testimony that he was not only selling the stock, he was selling an appeal, and it can be drawn from that testimony that other people than Mr. Potts and Mr. Boag were interested in that appeal. Whether we call it a class action, anything that resulted from that appeal, except selling it in this way, would have inured to the benefit

or the detriment, however it might work out, of the whole class of stockholders.

"I don't think that this Court should be called upon to approve a transaction involving the sale of an appeal, which is what, to a substantial extent, this amounts to. It was also, of course, a sale of stock. It seems to me that where others are interested in an appeal the sale of the appeal in that way is an unconscionable action.

"One other thing. The action of the Circuit Court of Appeals in dismissing this appeal does not necessarily force the conclusion that the Court concluded that it was an individual appeal and that others were not interested in it. * * * Under these circumstances, it may well be that in some other Court, at some other time, some or all of the preferred stockholders, including those who may have thought that Mr. Potts, in sending out a letter on the letterhead of the Independent Preferred Stockholders' Committee, was representing their interests, have some right to an accounting for what Mr. Potts cleared in this transaction over and above the fair value of the stock that he sold."

The Master also expressed his views in his report recommending denial of any compensation to Potts, and denial of an application which Potts had filed requesting approval of the sale to Bradley and Murphy (Young Ex. 20, R. 194, 195, offered R. 13):

"The testimony of Potts is that he did not consider the sale price of his stock to contain any compensation for services rendered by him in the proceeding, although such recovery was realized in the course of the settlement of the appeal. In such recovery the preferred stockholders, including those who responded to his appeal for support, have not shared although obviously they would have shared in any benefits which might have accrued if the appeal had been successfully prosecuted to a conclusion."

Potts took exceptions to the report of the Special Master recommending denial of compensation (Young Ex.

21, R. 198), and in his brief in support of the objections and exceptions (Young Ex. 22, R. 199, offered R. 13) he reverted once again to his contention that he was representing the interest of all of the preferred stockholders. Thus he says in his brief (R. 203):

“Applicant J. Fred Potts fought for the above amendments and we submit that those accomplishments which inured to the benefit of all the First Preferred Stockholders, don't reflect that Mr. Potts was looking after his own interests alone. We don't deny that Mr. Potts was looking after his family's interest in Higbee. He spent his own money and gave of his time freely for several years as a member of the New Preferred Stockholders Committee without the slightest hope of being reimbursed or compensated, and that is more than can be said for Messrs. Bloomfield and Orr who now accuse Potts of having had nobody's interest at heart but his own.”

Thus, even *after* the sale of his stock (and of the appeal) at an exorbitant profit, Potts was still claiming to be the champion of the interest of preferred stockholders other than himself.

Potts' application for compensation from the Debtor's estate was disapproved for the reason, among others, that the sale of his stock had not been approved by the court as was required by Chapter X, Section 249 of the Bankruptcy Act. Thereupon Potts filed an application for approval of the sale to Bradley and Murphy and the Master also recommended that this be denied (Young Ex. 20, R. 194, offered R. 13).

The Securities and Exchange Commission filed a memorandum with the District Court opposing the applications of Potts for compensation and for approval of the sale to Bradley and Murphy (Young Ex. 24, R. 216, offered R. 13). The District Court filed its memorandum on September 3, 1942 adopting the recommendations of the Master and thus refused to allow Potts any compensation or to approve the

sale of the Potts and Boag stock to Bradley and Murphy. The Court, after reciting the facts of the sale, stated the following (Young Ex. 25, R. 221, offered R. 13):

“There is no justifiable basis in these circumstances upon which the Court could bottom its approval of the settlement sale of this stock, nor does there appear any just reason for allowing compensation to these applicants. * * *

DISCUSSION.

The foregoing constitute the essential facts which should be considered by the court in this case. The Master went far outside of the record in his discussion and in his findings, most of which are irrelevant to the question of whether Potts and Boag are or are not entitled to keep the bonus they received when they sold out the interests of the hundreds of Higbee preferred stockholders.

It has been demonstrated above that Potts and Boag stated to all concerned that they were acting on behalf of stockholders generally and not just for themselves. The very nature of their objections was such that had they successfully litigated them to conclusion, the benefits would have inured to the Debtor and all preferred stockholders. The principal objection asserted was that the Bradley-Murphy claim either be eliminated as an indebtedness or greatly reduced. Obviously the Debtor would have benefited by the reduction in its total-debt which Potts and Boag were endeavoring to bring about.

In this respect the situation is analogous to a stockholder's suit wherein a single stockholder sues to recover assets which he claims rightfully belong to the corporation. This type of suit can be brought only in the interest of the corporation whether or not the stockholder bringing it purports to be acting alone or in a representative capacity.

As was stated in *Alexander v. Quality Leather Goods Corp.*, 269 N. Y. Supp. 499 (Sup. Ct. N. Y. 1934):

"When a minority stockholder brings an action on behalf of himself and on behalf of other stockholders similarly situated, he exercises a derivative right and judgment must ordinarily be rendered in favor of the corporation, though the corporation be a defendant in the action."

Similarly in *Curtiss v. Wilmarth*, 254 Mich. 242, 236 N. W. 773 (Sup. Ct. Mich. 1931), the court discussed the nature of an action by a stockholder saying:

"A suit by a stockholder is in fact a suit by the corporation to redress a wrong to the corporation, and the relief granted belongs to the corporation and not to the stockholder individually. He is not entitled to the money recovered. That goes to the corporation and not to the individual complainants."

In *Planten v. National Nassau Bank of New York*, 174 App. Div. 254, 259, 160 N. Y. S. 297, 302 (affirmed in *Planten v. Earl*, 220 N. Y. 677, 116 N. E. 1070), the Court discussed the rights of stockholders to bring actions for the benefit of the corporation and stated:

"When, however, a proper foundation is laid for such an action, the control of the litigation becomes vested in the shareholder who brings it and such others as may join therein, although the cause of action belongs to the corporation and *the fruits of the litigation inure to its benefit.*" (Italics added.)

In *Dean v. Kellogg*, 292 N. W. 704 (Sup. Ct. Mich. 1940), the Court discussed the nature of the case as follows:

"In the usual stockholders' derivative suit, the stockholders as plaintiffs are permitted to instigate the action in a court of equity to enforce a claim of the corporation. *Foss v. Harbottle*, 2 Hare's Ch. 461, 67 Eng. Rep. 189; *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827. Any recovery runs in favor of the corporation, for the shareholders do not sue in their own right.

Talbot v. Scripps, 31 Mich. 268; *Horning v. Louis Peters & Co.*, 202 Mich. 140, 167 N. W. 874; *Curtiss v. Wilmarth*, 254 Mich. 242, 236 N. W. 773. They derive only an incidental benefit."

An additional factor is significant here. Bradley and Murphy were in control of the policies of the Debtor. They were also asserting large claims against it. Debtor's attorneys never filed objections to these claims although Potts and Boag, as members of a preferred stockholders' committee, did so as early as 1938. Potts and Boag bitterly complained of the failure by Debtor's attorneys to file appropriate objections, thus admitting that the objections should properly be made on behalf of the Debtor and its preferred stockholders.

Bradley and Murphy as claimants to the junior indebtedness were interested in a plan of reorganization which would give them the largest participation possible in the reorganized company. Similarly the preferred stockholders were interested in obtaining as large a participation as possible. The plan provided for \$600,000 of notes and the majority of the common stock to go to the junior indebtedness. Bradley and Murphy paid members of a preferred stockholders' committee a bonus of \$100,000 in order to see this plan go through. Perhaps the parties to the transaction felt that they could avoid scrutiny because representation of stockholders generally in matters of this kind is less definite and concrete than the usual representation by an attorney of a single party litigant. However, for that very reason, if for none other, the court should more closely scrutinize the transaction so that the rights of the poorly represented stockholders will be amply protected. The making of a deal of this kind with the attorney and representative of stockholders is no less subject to criticism and appropriate court action than would be a payment by a litigant to the attorney for his individual adversary to cause the attorney to discontinue the litigation.

If the proceeds of the Potts and Boag appeal would have inured to the Debtor and its First Preferred Stockholders then the proceeds of the settlement of that appeal should likewise inure to the benefit of the Debtor and its First Preferred Stockholders. There is no logical distinction between the proceeds of the litigation itself and the proceeds of the settlement of litigation. A decree directing Potts and Boag to turn over the \$100,000 bonus is the proper remedial device.

The instant case is a flagrant example of misconduct. Potts and Boag were members of two committees. They solicited the right to represent all stockholders (R. 172-8). They urged upon the court that they represented stockholders generally. They urged meritorious objections to the plan on behalf of all stockholders. Bradley and Murphy paid the price for settlement, knowing full well that the payment would remain in the pockets of Potts and Boag and would not reach those they represented by any voluntary route. This case presents an opportunity to this Court to condemn this trafficking in litigation with all of its ramifications and the inherent evils which arise as a result of the possibility of such conduct. To permit a sale of an appeal under these circumstances, and thus create a precedent, would be a serious blow to the subsequent fair and ethical conduct of corporate reorganization proceedings.

Even more serious is the instant situation where the payment was made in such a manner that a final adjudication resulted, thus preventing any other security holder from presenting the matter for a judicial determination. Respondents appealed from a judgment of the District Court. After the time within which any others could bring an appeal the payment was made under a contract (R. 223) which specifically provided for the dismissal of the appeal. To the knowledge of all parties concerned, no appeal by any other was then possible. Thus did the matter result

in a final adjudication without any hearing on the merits. Surely under these circumstances the preferred stockholders are entitled to the proceeds of the settlement of the litigation brought on their behalf.

It is clear that the members of a stockholders' committee owe fiduciary obligations to the stockholders they represent. In 15 *Fletcher's Cyc. of Corps.* 411, the subject is discussed as follows:

"In reorganization proceedings committees are usually appointed; and while their powers are, as a rule very broad, their chief functions are to gather the stock or other securities, represent the owner in the reorganization, and prepare the plan of reorganization. *Their duties and obligations are of a fiduciary nature.*" (Italics added.)

Similarly, at page 415 Fletcher says:

"As fiduciaries for all the parties beneficially interested, the members of the committee must, in the execution of their trust, deal fairly and equitably, and are not entitled to use their position for personal profit."

Similarly, in *Parker v. New England Oil Corp.*, 4 Fed. 2d 392, 395 (Dist. Ct. Mass. 1924) the Court discussed the nature of the duties of stockholders' committees as follows:

"It is not desirable, probably not practicable, now to undertake to define exactly the nature and extent of their powers and duties. It is enough, for present purposes, to characterize them under the general term of fiduciaries. * * * They had the general rights and powers, and were subject to the general obligations and limitations, of trustees. They could not, of course, trade with their trust estate to their own profit or otherwise use their position for personal profit."

In *Mann et al. v. Commonwealth Bond Corp.*, 27 Fed. Sup. 315 (Dist. Ct. S. D. N. Y. 1938), the Court, in the head note, holds that:

"A reorganization committee must devote such moneys as come into its hands to the purposes of the trust and reorganize as well as possible the company involved."

See also *Trustees Corporation, Ltd. v. Kansas City, M. & O. R. Co.*, 18 Fed. 2d 765 (C. C. A. 8th, 1927).

It will be argued by respondent Potts that at the time he sold his stock he was not acting for the stockholders, and he will point to the Master's findings in support of this position (Finding 18, R. 242). See also order of Circuit Court of Appeals (R. 265).

Petitioner agrees that, as the matter turned out, a finding that Potts and Boag were actually acting only for themselves is fully warranted. Had they been acting for those whom they stated they represented, they would have turned over the proceeds of the sale of their appeal for distribution among all the members of the class.

It cannot be disputed, however, that Potts and Boag openly, although apparently in bad faith, held themselves out to be a committee organized for the protection of the preferred stockholders of Higbee. They made statements to this effect in briefs and pleadings filed with the District Court and they circularized the preferred stockholders with letters under the letterhead of "Independent Preferred Stockholders' Committee of The Higbee Company." (R. 172.)

There appeared to be a change of character. At one moment Potts and Boag represented themselves to be acting in a capacity which, as is demonstrated above, involves fiduciary obligations to stockholders. The next moment Potts and Boag were acting solely for themselves. Surely as fiduciaries they were obligated to advise those whom they represented that they, Potts and Boag, were no longer acting in a representative capacity. But as to this, Potts testified (R. 187):

"Q. But you hadn't told any of the preferred stockholders, that had written in to you regarding the Inde-

pendent Stockholders' Committee, that you were no longer representing their interest; is that true? A. No; I don't think we did. We didn't have any more communication at all, unless it was by telephone or somebody called up, or we called somebody up, or some stockholders called us up. The results of the money spent didn't justify many more communications going out.

"Q. As far as some of these people who wrote you were concerned though, they might reasonably have thought that the Independent Stockholders' Committee was still representing their interests and continuing in the course indicated in that letter of July 10? A. That might be true."

Potts and Boag should be estopped from relying in this case upon their undisclosed change of position. The stockholders were entitled to rely upon the representations which Potts and Boag had made, at least until notice to the contrary was given to them.

The obligations of Stockholders' Committee and their position in corporate reorganization proceedings were discussed in *Steere v. Baldwin Locomotive Works*, 98 Fed. 2d 889 (C. C. A. 3rd, 1938), where the court said:

"In the case of most corporations requiring reorganization the holdings of many security holders are too small to make possible independent action for their own protection. This has brought about the formation of committees for their protection. The history of corporate reorganizations before the adoption of Section 77B reveals too many instances of committees, often self constituted, formed ostensibly to protect security holders but actually serving their own or other private interests at the expense of those they were appointed to serve. One of the purposes of the Bankruptcy Act as amended is to assure such security holders that, so far as the court is able to ascertain after hearing, any committee permitted to intervene in their behalf is composed of able and honest individuals who are free of conflicting interests and reasonably representative,

and may, therefore, reasonably be expected adequately to protect their interests. The act seeks to assure such representation by authorizing such committees to be adequately compensated out of the debtor corporation's estate for constructive services rendered in assistance of the formulation and accomplishment of a fair and reasonable plan of reorganization. It should be administered in the light of these underlying purposes."

Surely the rule as stated in the *Steele* case is a most salutary one. Widely distributed security holders must look to the court for guidance and protection.

Whatever may be said about the sudden change by Potts and Boag in the role they were playing in this litigation, it seems clear that the payment by Bradley and Murphy and acceptance of payment by Potts and Boag of money for the "sale" of an appeal skirts dangerously close to, if it does not transgress, the prohibition of Section 29b(5) of the Bankruptcy Act which provides as follows:

"b. A person shall be punished by imprisonment for a period of not to exceed five years or by a fine of not more than \$5,000, or both, upon conviction of the offense of having knowingly and fraudulently . . . (5) received or attempted to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof from any person, for acting or forbearing to act in any proceeding under this Act;"

Acceptance of the payment for forbearing to prosecute the appeal in the bankruptcy proceeding and retaining the funds is the act of which complaint is here made. Potts and Boag should not be permitted to retain the fruits of a transaction of this character.

STATEMENT REGARDING WILLIAM W. BOAG.

During the course of the appeal in the Circuit Court of Appeals it first came to Petitioner's attention that Respondent Boag had entered the Armed Services. No one representing Boag has appeared to request a stay of proceedings pending his return. However, Petitioner has no desire to cause judgment to be entered against Boag under these circumstances. It would be entirely satisfactory to have the proceedings stayed as to Boag pending his return, although no rights against him are waived.

No similar disability exists respecting respondent Potts who was the major participant in the transaction, owning 250 shares, compared with 10 shares owned by Boag. Potts negotiated the agreement of March 7, 1942 (Young Ex. 26, R. 223, offered R. 13) for the sale of the stock, both on his own behalf and acting for Boag. Under these circumstances, Potts is responsible for the entire profit made in the joint venture. *Jackson v. Smith*, 254 U. S. 586, 41 S. Ct. 200.

CONCLUSION.

WHEREFORE, Petitioner, Robert R. Young, a holder of the preferred stock of The Higbee Company, respectfully prays that this Court reverse the judgments of the Courts below and direct the payment over by the respondent, J. Fred Potts, to The Higbee Company for its preferred stockholders of a sum equal to the difference between the fair value of 260 shares of First Preferred Stock of The Higbee Company on March 7, 1942, and the amount (\$115,000) paid therefor by Messrs. Bradley and Murphy—the amount of such difference to be determined by the Special Master below—together with interest on said sum, and that Petitioner be awarded the costs and proper disbursements made by Petitioner in all Courts, together with

such other relief as to this Honorable Court may seem just and proper.

Respectfully submitted,

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JAN 30 1945

In the Supreme Court of the United States

OCTOBER TERM 1944.

No. 342.

In the Matter of
THE HIGBEE COMPANY, *Debtor* } Bankruptcy No. 36,119.

ROBERT R. YOUNG,
Petitioner,

vs.

THE HIGBEE COMPANY,
WILLIAM W. BOAG and
J. F. POTTS,
Respondents.

REPLY BRIEF OF PETITIONER.

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REPLY BRIEF OF PETITIONER.

Comments regarding the reply brief filed by Respondent Potts are appropriate in five particulars.

I.

AS TO ALLEGED INACCURACIES IN PETITIONER'S BRIEF.

The brief of Respondent J. F. Potts claims generally that Petitioner's original brief is inaccurate and misleading. A careful reading of the brief, however, discloses that the *only* specific charge of this character pertains to the "Questions Presented" on page 4 of Petitioner's original brief. Question No. 1 reads as follows:

"1. After Potts and Boag had represented to the Court and to the Higbee preferred stockholders that they were acting as a committee in the interests of all preferred stockholders, can they thereafter accept and retain for themselves individually a \$100,000 consider-

ation for permitting the dismissal of an appeal which they had taken from a decree confirming the Amended Plan of Reorganization of The Higbee Company?"

Respondents' Brief at pages 6 and 7 in commenting on the foregoing "Questions Presented" states as follows:

"These questions *assume* that 'Potts and Boag had represented' that they were acting in a representative capacity.

"That assumption is contrary to the explicit findings of fact made by the lower courts."

Turning to the record: At page 194, the Special Master on August 1, 1942 made the following finding:

"Applicant (i.e. Potts) and Boag, *who had previously held themselves out as 'a committee organized solely for the benefit of preferred stockholders,'* dismissed their appeal pursuant to an arrangement with Charles L. Bradley and John P. Murphy by which they sold their First Preferred Stock, 260 shares of which applicant held legal title to 250 shares, for \$115,000; which stock had a par value of \$26,000 and a market value of considerably less." (Emphasis added.)

Question No. 1 on page 4 of Petitioner's original brief is strictly in accordance with this finding and assumes nothing contrary thereto. It is also substantiated by the pleadings and briefs filed by Potts, and the letter sent to stockholders by Potts under the letter-head "Independent Preferred Stockholders' Committee of The Higbee Company" (R. 172).

II.

AS TO THE FINDING OF FACT THAT POTTS AND BOAG WERE ACTING SOLELY IN THEIR OWN INTEREST.

The courts below have found that Potts and Boag were acting only in their own interest in appealing from the order confirming the Higbee plan of reorganization. Therefore, Respondents argue that they need not account for the proceeds of the sale of the appeal.

Petitioner does not seek a review of this finding. It is abundantly clear that Potts and Boag were acting only in their own selfish interests when they "sold" their appeal, retained the proceeds, and deprived other stockholders of an adjudication of the issues they had raised. It does not follow, however, that Potts and Boag are relieved of the duty to account, because:

First, Respondents are liable here because they *purported* to act in the interest of all stockholders. They *ostensibly* represented stockholders generally and led the stockholders to believe accordingly. That they were actually acting for themselves does not relieve them of the natural consequences of the fiduciary relationship which they openly assumed.

Second, irrespective of their numerous statements and representations, Respondents are liable here because of the nature of the objections which they asserted. Had they prevailed in their appeal, all preferred stockholders would have benefited. Under these circumstances the formalities of the pleadings are immaterial. The right of appeal from the order approving the plan belonged to the entire class. To permit such an appeal to be compromised for the enrichment of only a few members of the class would violate one of the fundamental purposes of the bankruptcy act—the avoidance of preferential treatment among security holders of equal rank.¹ This Court in *Sprague vs. Ticonic National Bank*, 307 U. S. 161, swept aside contentions by that respondent that the titles and formal designations employed in the litigation should control its essential character. Petitioner Sprague had successfully litigated on her own behalf rights under a trust agreement, and by doing so

¹ See Bankruptcy Act Chapter X, Sec. 197 requiring the judge to classify stockholders "according to the nature of their respective . . . stock" and Sec. 216 dealing with plans of reorganization and provisions thereof altering or modifying the rights of "stockholders generally or some class of them."

she established the rights of all others similarly situated. In holding that she was entitled to an allowance of fees for her attorney, this Court said:

“Whether one professes to sue representatively or formally makes a fund available for others may, of course, be a relevant circumstance in making the fund liable for his costs in producing it. But when such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation—the absence of an avowed class suit or the creation of a fund, as it were, through *stare decisis* rather than through a decree—hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation. As in much else that pertains to equitable jurisdiction, individualization in the exercise of a discretionary power will alone retain equity as a living system and save it from sterility.”

Indeed, Respondent Potts knew that his activities were in the interest of all stockholders when, despite the “sale” of his appeal, he filed an application for fees and testified (R. 187), “Anything that we² accomplished, of course, would inure to the benefit of all of them. We couldn’t prevent that.”

At page 26 of Respondents’ brief it is stated, “* * * the *only* persons who could have received the benefits of the appeal were the appellants themselves.” Respondent reasons that because other stockholders had either accepted or not opposed the Higbee plan they would not receive the benefits which a successful prosecution of the appeal would have provided. This is not good bankruptcy law. If a plan of reorganization is held to be unfair, then it is unfair to security holders who have approved it as well as those who have opposed it, and a subsequent modification of the plan will benefit all. The argument contained in

² The record at this point contains the word “he.” It is obvious, however, that this is in error and the word should be “we.”

the brief is directly contrary to the testimony of Respondent Potts quoted above. The case of *Bank vs. Flershem*, 290 U. S. 504, cited as authority by the Respondent, was not a bankruptcy case. It involved a receiver's judicial sale which was set aside at the instance of a minority creditor after the majority had collaborated in an effort to treat unfairly an uncooperative minority by means of a sale for less than the property was worth. The case is not authority for the proposition stated by Respondent that consent to a plan is binding before confirmation so that the consenting stockholder will not be entitled to more favorable treatment later provided by amendment.

Respondent, at pages 1, 8, 14, 20, 24 and 25 of his brief, asserts that *all* of the preferred stockholders of Higbee, except Potts and Boag individually, had accepted the Higbee plan of reorganization at the time Potts and Boag filed their appeal from the order of confirmation. If by this Respondent means that Potts and Boag were the only ones actively opposing the plan, then Petitioner does not disagree. If, however, Respondent Potts is seeking to convey the impression to this Court that each and every preferred stockholder of Higbee affirmatively filed a written acceptance of the Higbee plan, then the statements contained in the brief are untrue to the knowledge of Respondent Potts.

Respondent cites in support of the allegations contained in his brief two remarks by Judge Jones (R. 221 and 252), in neither of which was the question of the percentage of consenting shareholders in issue, and in both of which the District Judge was merely referring to the acceptances of the plan by the requisite percentage of preferred stockholders and the apparent acquiescence in the order confirming the plan by all shareholders except Potts and Boag who were the only ones who filed notices of appeal. A substantial number of preferred stockholders did not affirmatively file written consent to the plan.

III.

AS TO THE MOTIVES OF BRADLEY AND MURPHY IN PURCHASING THE POTTS AND BOAG STOCK.

It is claimed that Potts and Boag must be exonerated because Bradley and Murphy were motivated in their purchase by circumstances which arose in litigation between Young and Bradley and Murphy. Briefly the facts are as follows:

A—Young had sued George Ball (a) for violation of the Securities and Exchange Act of 1934 charging wrongful manipulation of stock, and (b) for breach of numerous warranties in an original contract of sale.

B—On March 2, 1942, settlement was effected and a corporation of which Young was a minority stockholder acquired a note of Bradley and Murphy and declared the same due and payable.

C—Bradley and Murphy in order to raise the money removed the Potts and Boag litigation.

These matters are all entirely irrelevant to the question of whether Potts and Boag violated the duties they had assumed in favor of the preferred stockholders. No action by any individual or group of individuals (barring express approval of their conduct by all preferred stockholders) could give Potts and Boag justification for their otherwise wrongful conduct. The activities of Young in some other litigation, not presently before this Court, could neither excuse Potts and Boag, nor deprive the preferred stockholders generally of their right to an accounting.

Although the activities of Young are not involved in this case, one may well contrast the utter disregard of the interests of the preferred stockholders demonstrated by Potts and Boag when they "sold" their appeal, with the action of Young disclosed by this record. Respondent Potts testified as to Young's position with respect to the dis-

missal of the Potts and Boag appeal in the event Young should succeed to the Bradley-Murphy position (R. 30):

“Q. Up to that time though you had had no discussion of the basis upon which the appeal was to be dismissed or—

A. Well, not in detail. However, Mr. Purcell, I think, did suggest that Mr. Young might be willing to make some concessions to the stockholders in reducing the amount to be received on the junior debt and take more common stock in lieu thereof. I don't recall at this time any other suggestions about terms or conditions under which the appeal would be dismissed.”

Again at page 189 Potts testified:

“Q. Were there any other people interested in buying this stock at the time that you sold it to Mr. Bradley and to Mr. Murphy?

A. No; I don't think so.

Q. Mr. Young wasn't interested?

A. Apparently not.”

.

“Q. He didn't offer you anything to go on with the appeal, did he?

A. No * * *.”

Furthermore, prior to the “sale” of the appeal, Petitioner had advised Potts that in the event a compromise could be reached, “whereby some of the junior debt would be foregone in lieu of common stock,” that Potts “would be entitled to file an application for compensation in the reorganization proceeding” (R. 47).

Thus the basis of discussion between Young and Potts concerning the conduct of the litigation was in accordance with legitimate and proper bankruptcy practices.

IV.

AS TO THE EFFECT OF THE DECISION OF THE CIRCUIT COURT OF APPEALS PERMITTING DISMISSAL OF THE APPEAL.

It is urged that the dismissal of the appeal resulted in a binding adjudication that Respondents Potts and Boag may keep the proceeds. This is a *non sequitur*. No question was presented to the Circuit Court of Appeals relating to the disposition of the proceeds of the stock sale and no adjudication on that question resulted from the dismissal. Furthermore, Potts and Boag having "sold" and assigned the appeal were not even parties to the proceedings before the Circuit Court at the time of its dismissal. The question there was whether Bradley and Murphy, being officers and directors of the Higbee Company, Debtor in possession, could purchase an appeal which challenged the fairness of the Higbee plan and the extent of their individual participation in the reorganization, and then dismiss the appeal thus purchased.

V.

AS TO THE POWER OF THE BANKRUPTCY COURT.

Respondent concedes (his brief page 22) that an abuse may exist in a situation of this character. It is claimed, however, that the courts are powerless to correct it and that complaints should be directed to the legislature.

The Bankruptcy Act, Chapter X, Section 212, provides in part as follows:

"The judge may examine * * * any * * * committee or other authorization, by the terms of which an agent, attorney, * * * or committee purports to represent any

creditor or stockholder, may enforce an accounting thereunder * * *.”³

Thus the bankruptcy court has specific authorization to “enforce an accounting” against an agent, attorney or committee which “purports to represent any creditor or stockholder.” Even in the absence of such specific legislative authority, the bankruptcy court has inherent supervisory and disciplinary powers over attorneys and committees to compel the fair and proper administration of the act.

Respectfully submitted,

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³ The entire section reads as follows:

“The judge may examine and disregard any provision of a deposit agreement, proxy, power or warrant of attorney, trust mortgage, trust indenture, or deed of trust, or committee or other authorization, by the terms of which an agent, attorney, indenture trustee, or committee purports to represent any creditor or stockholder, may enforce an accounting thereunder, may restrain the exercise of any power which he finds to be unfair or not consistent with public policy and may limit any claim or stock acquired by such person or committee in contemplation or in the course of the proceeding under this chapter to the actual consideration paid therefor.”

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✓ *Respondents.*

BRIEF OF RESPONDENTS

**On Petition for Writ of Certiorari
To the United States Circuit Court of Appeals
For the Sixth Circuit.**

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For the Sixth Circuit.

STATEMENT OF ISSUE.

No principle of law about which there is the slightest dispute is raised by the petition. Petitioner seeks to have this Court reverse the findings of the lower Courts in order that Potts, alone, be required either to account to The Higbee Company for the difference between the market value of the stock at the time of the sale, sold to Bradley and Murphy and the sum received therefor, or to require Potts to pay to the preferred stockholders a similar sum of money. As stated in the order of the Circuit Court of Appeals (R. 264), this relief is sought on the theory:

“that (a) Potts and Boag in the prosecution of their appeal to this Court were acting for themselves and all preferred stockholders, or (b) that Potts and Boag

in the prosecution of their appeal were asserting a derivative right belonging to the debtor; * * *."

FACTS.*

Were it not for the charge in the petition (p. 3) that respondents acted in bad faith and with flagrant misconduct (p. 21) the facts essential to the determination of the single issue presented could be stated very briefly. However, lest the failure of the respondents to defend themselves against the unfair charges contained in the petition give rise to the inference that the charges of reprehensible conduct are true, certain of the findings of the courts below must be presented in this Brief:

In June of 1937, Charles L. Bradley and John P. Murphy acquired from the Ball Foundation (hereinafter referred to as Ball) the Higbee securities, and paid therefor the sum of \$600,000, \$60,000 of which was paid in cash and the balance by the purchasers' note for \$540,000 secured by the pledge of the Higbee securities. (Finding 2, R. 240.) The purchasers' note provided that, in the event of sale of the collateral, the holder of the note was under no obligation to account to the makers for any over-plus in case the sale should produce more than the amount of the indebtedness. (Finding 7, R. 241.)

A Plan of Reorganization for The Higbee Company was filed in 1940, which provided that the securities which Bradley and Murphy had purchased would finally represent a majority of the common stock of The Higbee Company. (Finding 8, R. 241.) The respondents, prior to that time, had been members of a preferred stockholders committee but they resigned from the committee, after the plan had been filed, because they disagreed with the other members of the committee over the treatment of the securities which Bradley and Murphy had purchased although

*See the Precise Issue of Fact p. 6 *infra*.

the Plan of Reorganization, in this respect, was agreeable to all members of the Committee except respondents. (Finding 9, R. 241.)

Thereafter the respondents tried to form a new committee to oppose the plan but were unsuccessful in their effort and no one joined with or authorized respondents to act for them. (Finding 10, R. 241.) Petitioner's lawyer admitted that Potts informed him of this. (R. 47, 232.) Respondents requested petitioner to join with them but he refused. (Finding 13, R. 242.) Thenceforth the respondents, solely upon their own behalf "and not as representing other interests or rights," prosecuted their objections and exceptions to the plan. (Finding 11, R. 241.)

In May of 1941, shortly after the Circuit Court of Appeals of the Sixth Circuit (*In re Van Sweringen Corporation*, 119 F. (2d) 231) held that petitioner's company (Midamerica) never had anything more than a nominal interest in The Higbee Company's landlord, The Cleveland Terminals Building Company, petitioner and his associate, one Kirby, brought suit against Bradley and Murphy, asking that petitioner and Kirby be declared to be the equitable owners of the Higbee securities. (Finding 14, R. 242.)

At about the time this suit was brought, petitioner told respondents that he was not interested in respondents' opposition to the Plan of Reorganization because it was to petitioner's interest "to have Bradley and Murphy get all they could for said securities under the Amended Plan of Reorganization so that there would be that much more for Young (petitioner) to try to take away from them." (Finding 15, R. 242.)

The avails of the securities acquired by Bradley and Murphy, under the Plan of Reorganization, were ample for financing the payment by Bradley and Murphy of their \$540,000 note, (Finding 20, R. 243) but the appeal taken by respondents prevented the confirmation of the Plan. (Finding 21, R. 243.) Petitioner knew this. (Finding 22, R. 243.)

Petitioner and said Kirby on March 2, 1942 acquired from Ball the Bradley and Murphy note, including the collateral pledged therewith, which consisted of the Higbee securities. (Finding 5, R. 240.) On the very next day, petitioner and Kirby declared the note due, and served notice of their intention to sell the collateral and to bid at the sale. (Finding 6, R. 240.)

It is important at this point to bear in mind that, under the peculiar provisions of the note relieving the holder from any duty to account to the makers for any overplus which the sale might produce, the holder of the note was in a position to bid in collateral without any competition from other bidders. (Finding 7, R. 241.)

Bradley and Murphy then, being faced with the practical certainty of losing their investment to petitioner, unless they were able to pay their note, began negotiating for the purchase of respondents' holdings, so that the appeal then pending in the Circuit Court of Appeals could be dismissed and the Plan thereby confirmed. (Finding 24, R. 243.) Petitioner's counsel tried to induce respondents not to sell to Bradley and Murphy, and in fact stated that petitioner would meet any offer which Bradley and Murphy should make. (Finding 26, R. 244.) Thereafter respondents sold their holdings to Bradley and Murphy for \$115,000 (Finding 28, R. 244), and a stipulation was filed in the Circuit Court of Appeals by Bradley and Murphy, as successors to the rights of respondents, seeking to dismiss the appeal. (Finding 31, R. 244.)

Petitioner thereupon sought to intervene in the Circuit Court of Appeals so as to object to the dismissal (Finding 31, R. 245) upon the ground that respondents were, in the prosecution of their appeal, acting in a representative capacity on behalf of all preferred stockholders. (Finding 33, R. 245.)

At this point the Securities and Exchange Commission notified the Circuit Court of Appeals that it consid-

ered the Plan of Reorganization fair and reasonable and that it had no objection to the dismissal. (Finding 34, R. 245.)

After a full hearing, at which counsel for petitioner was present and participated, the Circuit Court of Appeals dismissed the appeal. (Finding 36, R. 245.) The Plan having thus been confirmed, Bradley and Murphy were able to borrow sufficient funds to pay their note which petitioner had procured on May 2, 1942. (Finding 41, R. 246.)

Petitioner, having thus been thwarted in his scheme to capture from Bradley and Murphy the Higbee securities by purchasing them, without competition, at forced sale has ever since that time pursued the respondents.

The studied lack of candor employed by petitioner in his presentation is persuasively demonstrated by the language omitted in the quotation on page 16 of petitioner's brief, where the statement of Mr. Sherwood of the Securities and Exchange Commission is only partially printed. The omitted part, shown only by the use of three asterisks, is (R. 193):

"Mr. Young (the petitioner) made application to intervene in the proceedings and the Court refused to grant it. Mr. Young's purpose, obviously, in wanting to intervene, was to continue with the appeal and even if the appeal was a representative or class appeal, the Court, in its discretion, could dismiss it and it might very well appear to the Court that the motives of Mr. Young, who had, through counsel, expressed his approval of the Plan, and the appeal was, of course, from the confirmation of that Plan, the circumstances under which he then wished to intervene were not such as to induce the Court to grant the application."

Not only did the Court of Appeals of the same Circuit pass upon the question adversely to petitioner both times it was presented, but a majority of the Judges sitting on the two occasions were the same persons.

As stated in the opinion of the District Court, in restrained language:

“Based upon a knowledge of the history of these proceedings, it must frankly be said that this matter arises out of a personal controversy between the exceptor Young, and Bradley and Murphy, growing out of earlier relationships and over control of The Higbee Company.” (R. 252.)

THE PRECISE ISSUE OF FACT.

The only findings of fact made by the Master, all of which were adopted by the two courts below, and which are essential to the single question raised by the petition, are:

(Finding 9, R. 241):

“Prior to the filing of said Amended Plan of Reorganization, J. F. Potts and William W. Boag had been members of the New Preferred Stockholders Committee, but they resigned at that time as members of such Committee because they disagreed with the other members of the Committee respecting the treatment of the junior indebtedness, which treatment as set forth in the Amended Plan of Reorganization was agreeable to all members of the Committee except Potts and Boag.”

(Finding 10, R. 241):

“Upon their resignation as members of said Committee, Potts and Boag solicited the support of other preferred stockholders to join them in opposing the provisions of the Amended Plan of Reorganization relating to the treatment of the junior indebtedness; which solicitation was unsuccessful and no one joined with or authorized Potts and Boag to act for them.”

(Finding 11, R. 241):

“Thereafter, and on December 18, 1940, and thenceforth until the dismissal of their appeal by the Circuit Court of Appeals on March 11, 1942, Potts and Boag, solely in their individual capacities and not as representing other interests or rights, prosecuted their ob-

jections and exceptions to the confirmation of the Amended Plan of Reorganization."

(Finding 37, R. 246):

"The evidence offered fails to show that Potts and Boag represented any other stockholders than themselves and in the filing of objections to the confirmation of the Amended Plan of Reorganization and in the prosecution of their appeal from the order of the United States District Court confirming the Amended Plan of Reorganization, said Potts and Boag acted only for themselves individually and not as the representatives of a class and their appearance in these proceedings was at no time derivative in its nature or effect."

ARGUMENT.

Since the only theory upon which petitioner seeks relief is that Potts and Boag were acting either in a representative capacity or that they were asserting a derivative right, the theory falls of its own weight in the light of the findings of fact that Potts and Boag were acting solely for themselves. That they had the right to act solely for themselves is perfectly clear from the express provisions of Chapter 10 of the Bankruptcy Act, which provide:

Section 206:

"The debtor, the indenture trustee, and any creditor or stockholder of the debtor shall have the right to be heard on all matters arising in a proceeding under this chapter. * * *"

Section 209:

"Any creditor or stockholder may, in a proceeding under this chapter, act in person, by an attorney at law, or by a duly authorized agent or committee."

The record fails to disclose that Potts and Boag either intervened or attempted to intervene as a stockholders committee. Accordingly, the authority upon which petitioner relies, sound as it may be, has no application to the factual situation as found by the tribunals below.

CONCLUSION.

The petition constitutes nothing more nor less than an effort to re-argue the evidence presented to the Special Master, as petitioner has argued it before the Special Master, before the District Court and before the Circuit Court of Appeals, in all of which the facts were determined against him. No conflict of decision between the Circuit Courts of Appeals of different circuits is involved. Nor is any question of law, of importance to the public, presented about which there is a substantial doubt. The petitioner seeks only to re-argue the evidence, after both courts below decided all questions of fact against him. *Texas & New Orleans R. R. Co. et al. v. Brotherhood of Ry. and Steamship Clerks, et al.*, 281 U. S. 548.

It is therefore respectfully submitted that the Petition for Writ of Certiorari should be denied.

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PAUL S. KNIGHT,

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FILED
SEP 30 1944

CHARLES ELMORE COMPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1944.

No. 342.

ROBERT R. YOUNG,
Petitioner,

vs.

THE HIGBEE COMPANY,
WILLIAM W. BOAG, and
J. F. POTTS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE SIXTH CIRCUIT.

**BRIEF OF RESPONDENT,
J. F. POTTS,**
In Reply to Memorandum for
The Securities and Exchange Commission.

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BRIEF OF RESPONDENT,

J. F. POTTS,

**In Reply to Memorandum for
The Securities and Exchange Commission.**

INTRODUCTORY STATEMENT

This brief is by way of reply to the Memorandum filed *amicus curiae* by the Securities and Exchange Commission. The only appearance which the Commission has seen fit to make, at any time prior to the filing of its Memorandum in support of the Petition for Writ of Certiorari, was before the Special Master, at which time the Commission took the position that the Bankruptcy Court was without jurisdiction to consider the issues raised by the application which is the subject matter of this controversy. (R. 9.) No exceptions were filed by it to the report of the Special Master. No appearance was made on its behalf either in the District Court or in the Circuit Court of Appeals.

STATEMENT.

The Memorandum filed by the Commission demonstrates a substantial lack of familiarity with both the evidence and the pleadings, due, without doubt, to the fact that the Commission's connection with the controversy was only casual.

(a) The assertion on page 4 of its Memorandum, that the Court below impliedly conceded that had Potts and Boag taken their appeal in a representative capacity and not as individuals, it would have been inequitable not to share with other stockholders the consideration they received for abandoning the appeal, is neither warranted by the per curiam opinion nor by the pleadings. The very grounds upon which petitioner seeks his relief as stated in his application and by the Court below is that Potts and Boag were acting in a representative capacity or were asserting a derivative right. (142 F. 2d 1004.) The Circuit Court of Appeals merely found that, since the evidence failed to support the grounds alleged in Petitioner's application, the relief sought upon those grounds was likewise denied. No other inference or implication can fairly be drawn from the per curiam opinion.

(b) The assertion on page 8 of the Commission's Memorandum that Potts and Boag realized much more than the improved position which they sought for themselves in the reorganized corporation and that the compromise was therefore not merely of the gains which they sought for themselves, but was necessarily a compromise of the gains which every stockholder participating in the reorganization would have received from a successful appeal, is not at all warranted either by any evidence that was before the Court nor by the extensive findings of fact made by the Special Master. Young, the petitioner here, had been invited by Potts to join in the latter's exception to the Plan of Reorganization and had refused. (F. 13, R.

242.) Thereafter Young brought suit against Bradley and Murphy asking that the equitable ownership of the Higbee Junior Indebtedness be declared to be his. (F. 14, R. 242.) After the institution of these proceedings Young notified Potts that his only interest would be in having Bradley and Murphy get all they could for their securities so that there would be that much more for Young to take away from them. (F. 15, R. 242.) On March 2, 1942, petitioner acquired the Bradley and Murphy note for \$540,000.00 and the collateral pledged therewith which included the Higbee Junior Debt. (Finding 5, R. 240.) On the very next day, petitioner declared the note due and served notice of his intention to sell the collateral and to bid at the sale. (Finding 6, R. 240.) Under the peculiar provisions of the note relieving the holder from any duty to account to the makers for any overplus which the sale might produce, the holder of the note was in a position to bid in the collateral without any competition from any other bidders. (Finding 7, R. 241.) At this point, and for the first time, the appeal filed by Potts assumed a substantial strategic value because it was the only thing which might enable Young, without cost to himself, to take away from Bradley and Murphy the Higbee Junior Indebtedness. (F. 21, R. 242.) Prior to this time the appeal by Potts and Boag was of little importance "for it had been denied by the Master and the District Court and their appeal was generally considered without merit."¹ The purchase by Bradley and Murphy from Potts and Boag of the latter's holdings was not for the purpose of preventing the success of the Potts-Boag appeal but was solely to enable Bradley and Murphy to protect themselves against Young's scheme to deprive them of the benefits of their investment. (F. 28, R. 244.) The Courts below expressly found that the strategic value of the Potts-Boag stock was not only created solely by Young,

¹ Report of Special Master R. 230.

the petitioner here, but that he tried to persuade the respondents not to sell, and offered to meet any price which Bradley and Murphy might offer. (F. 20, R. 243; F. 26 and 27, R. 244.) The purchase by Bradley and Murphy of the Potts-Boag securities, in effect, resulted in the expeditious confirmation of the Plan of Reorganization (F. 28, R. 244) at a time when "The Higbee Company Plan of Reorganization long since had been confirmed and was acceptable to every interest except to * * * Potts and Boag." (R. 242.) There is no evidence in the record indicating the extent, if any, by which Potts and Boag profited by their sale to Bradley and Murphy. It is true that it represented \$26,000 in face amount, upwards of \$19,000 in past due dividends and, on the basis of the work out of the Reorganization Plan, something in excess of \$50,000 in marketable securities. Moreover, there is no evidence of the amount of expenses incurred by Potts and Boag in the employment of auditors, the employment of court reporters, the printing of records and the employment of counsel. The record therefore does not support the statement of the Commission that Potts and Boag realized more than the improved position which they sought for themselves in the reorganized company. It is even debatable whether the success of their appeal would have inured to the benefit of the preferred stockholders to the extent of one dollar. The financial condition of the Company was such that the preferred stock was entirely sound, and preferred stockholders can ask for no more.

ARGUMENT.

It is the Commission's contention now, that although the Bankruptcy Act expressly authorizes any interested stockholder in a reorganization proceeding to appear on his own behalf, that such stockholder may not sell his holdings for more than their market value, without accounting to all other stockholders for all sums in excess of the market

value of the stock so sold. The logic of this position must go so far as to include a situation where the excepting stockholder had invited all other stockholders to join with him and share in the expense and responsibility of his proceeding (F. 10, R. 241); where every stockholder had refused to so join (F. 10, R. 241); where every other stockholder was interested in the expeditious final confirmation of the Plan of Reorganization (R. 252); where the Plan of Reorganization, after careful study by the Securities and Exchange Commission, had been found by the Commission to be fair and feasible (R. 79); where every interest except the excepting stockholder had long since confirmed and accepted the Plan of Reorganization (R. 252) and where the strategic value of the shareholder's holdings arose, not because of the legal merit of his appeal or the desire of any one to prevent the success of his appeal (R. 230) but because of the scheming of another stockholder (Young) who had refused to join in the appeal but nevertheless attempted unsuccessfully to make use of it for his own selfish benefit. (R. 243.) All of these facts existed.

The Commission now urges this Court to interpret the Bankruptcy Act so as to make entirely meaningless the individual right given to a small minority shareholder to assert his individual views where they may be in conflict with perhaps a powerful majority.¹ If Congress had intended that all of the burdens of a representative proceeding shall be imposed upon the individual stockholder, without its equivalent benefits, the language used in Section 206 would have been quite different than it appears in the footnote.

¹ Section 206: "The debtor, the indenture trustee, and any creditor or *stockholder* of the debtor shall have the right to be heard on all matters arising in a proceeding under this chapter

• • • "

Section 209: "*Any* creditor or *stockholder* may, in a proceeding under this chapter, act in person, by an attorney at law, or by a duly authorized agent or committee."

In the case of *May v. Midwest Refining Co.*, 121 F. 2d 431,² the Circuit Court of Appeals, in effect, coercively required a shareholder to accept what in substance amounted to a settlement under similar circumstances although not involving the provisions of the Bankruptcy Act where the rights of individual shareholders are meticulously safeguarded. In that case the shareholder was required to accept \$1246.22 as the dollar reimbursement for the damage to his stockholdings, but was awarded in addition thereto \$43,146.27 for the expense, including attorney's fees, of conducting, singlehanded, the litigation which he believed necessary to protect his rights.

The Court, in commenting on the theory for which the Commission here contends, said (p. 440):

"In our opinion Rule 23 (c) of the Federal Rules of Civil Procedure, 28 U. S. C. A. following Section 723c, which requires that actions of this sort shall not be dismissed or compromised without the approval of the Court and notice to all members of the class of which the plaintiff is one in such manner as the Court may direct, does not apply to the situation presented in the case at bar. The reason for this is that the rule is appropriate to, and so must have been designed to cope with a situation in which a dismissal or compromise of an action of this nature by a plaintiff would affect the rights of other members of the plaintiff's class, that is, to the situation presented when other members of the plaintiff's class have intervened, or when the wrongdoing corporation has sought to settle with the corporation which it has wronged instead of only with the individual plaintiff-stockholder who has brought suit, in either of which events the rights of other members of the plaintiff's class might be effected. But when, as here, no other stockholder has sought to intervene, and no compromise has been attempted with the allegedly wronged Midwest Refining Company, we

² Petition for Writ of Certiorari denied October 20, 1941, 314 U. S. 668.

fail to see how a compromise with the plaintiff alone could affect the rights of any one else."

The case of *Keller v. Wilson, et al.*, 174 Atl. 45 (Court of Chancery of Delaware, August 4, 1937) had occasion to deal with a similar question. An action had been brought by a shareholder claiming that an amendment to the corporation's charter providing its Class A stock to be automatically converted into common stock was invalid. The plaintiff asserted that the action was brought on behalf of himself and all other shareholders similarly situated. The case was tried and went to the highest court and returned for re-trial. At this point the plaintiff compromised his controversy and a stipulation of dismissal was prepared and filed. Before the dismissal stipulation was approved by that court another stockholder who had knowledge of the pendency of the proceedings but failed or refused to participate in them, sought to intervene and prevent the dismissal. The Court held that the plaintiff had a perfect right to control his own litigation even if it be assumed that it was a class action. The Court said:

"Now the petitioner was aware almost from the commencement of this litigation of its pendency. He took no steps to intervene in the cause and thereby share the burden and expense of its prosecution. The complainants carried it through this court and up to the Supreme Court. When it was returned to this court and an answer put it in shape for a final hearing, the defendant concluded to make his peace with the complainants. The complainants were willing to settle the controversy, did so on terms satisfactory to themselves and stipulated for a dismissal. When the case had reached this late stage, the petitioner came forward and by his attempted intervention seeks to deprive the defendant of the result for which it paid in settlement."

In giving more than lip service to the policy of the law that encourages settlements, the Court said of this situation:

"This does not seem to me to be just. It is the policy of the law to encourage and favor settlements. If the last minute assertion, not of a right, but of a privilege known for as long as two years to exist, can be permitted to intervene to arrest the results of peaceful settlements, it would seem that parties in such cases as this could never negotiate a composition of their differences with any assurance that the terms of settlement could be carried out.

"The defendant bargained in its settlement for a dismissal of this particular suit, and I am of the opinion that the petitioner should not be permitted, upon hearing of the settlement, to inject himself between the defendant and the full enjoyment of the settlement's stipulated result."

CONCLUSION.

Since no new or novel question of law is presented—petitioner seeking solely to re-examine the facts which have thrice been determined against him—it is submitted with great respect that, notwithstanding the statement in the Commission's Memorandum to the contrary, no issue of public importance can arise over the question of whether petitioner, who was unsuccessful in his effort wrongfully to use respondent's appeal for the accomplishment of his own selfish purpose, can now participate in a benefit which arose, if at all, as the result of a proceeding in which petitioner not only refused to join and share in its responsibility (F. 13, R. 242), but which he hoped would be unsuccessful except to the extent that its pendency served his own purpose (F. 22, R. 243) and when he and every other preferred stockholder has received every benefit without any diminution whatsoever which is provided for under the terms of his conduct as a preferred stockholder with the Debtor in reorganization.

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In the Supreme Court of the United States

OCTOBER TERM 1944.

No. 342.

ROBERT R. YOUNG,

Petitioner,

vs.

THE HIGBEE COMPANY,

WILLIAM W. BOAG and J. F. POTTS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF RESPONDENT J. F. POTTS.

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BRIEF OF RESPONDENT J. F. POTTS.

COUNTER STATEMENT OF THE GENERAL NATURE OF THE CASE.

In the Petitioner's Brief, the statements of fact are in some respects so inaccurate, and in many others, so incomplete and misleading, that it will be necessary for us to restate the Facts which are involved in this case with considerable particularity.

As indicated in Petitioner's Brief, this case grows out of a corporate reorganization in Bankruptcy.

An Amended Reorganization Plan was approved by *all* of the Preferred Stockholders of the corporation, with only two exceptions.

After the Plan had been approved and confirmed by the District Court (Judge Paul Jones) these two dissenting Preferred Stockholders (the present respondents) filed their individual appeal to the Circuit Court of Appeals.

While their appeal was pending, it became a pawn in a financial battle between the Petitioner, Robert

R. Young, on the one hand, and Charles A. Bradley and John Murphy (who were co-respondents in the lower courts) on the other hand.

The details of this battle, and the manner in which the appeal became a pawn in this financial chess game, are set out in detail in the Master's Report (228-248) and will be explained at some length in the Counter-Statement of Facts.

At this point it is enough to say that Bradley and Murphy were placed in a position such that they were obliged to raise a half million dollars within a very few days or find their interests in The Higbee Company sold at public auction by Petitioner Young.

The pendency of the appeal threw such doubt upon the finality of the corporate reorganization that the banks would not lend Bradley and Murphy any money with which to save themselves.

In this situation a "foot-race" developed, in which Bradley and Murphy competed with Petitioner Young for the purchase of the stock of the appellants. Bradley and Murphy wanted the stock so that they could *dismiss* the appeal.

Petitioner Young attempted as diligently to buy the stock, so as to make sure that the appeal would *not* be dismissed.

In other words, Bradley and Murphy were desperately anxious to buy the stock—so that they could dismiss the appeal—so that they could borrow \$500,000.00—and so that they could save their financial skins.

Petitioner Young was equally anxious to get the stock—so that the appeal would *not* be dismissed—so that his enemies Bradley and Murphy could *not* borrow the \$500,000.00 which they needed—so that their securities could be and would be sold at public auction—and so that he (Petitioner Young) could bid them in.

In short, the immense value of the stock which was owned by the appellants, and the immense significance of

the appeal which they had filed, had no relationship at all to the merits or lack of merits of the appeals, and did not concern at all any of the rights or interests of The Higbee Company or the other Preferred Stockholders.

For purely fortuitous reasons, this stock (and the right to control the appeal filed under it) had acquired great value.

Bradley and Murphy won the "foot-race," and bought the stock, and paid an amount which was substantially greater than its market value.

As soon as they had the stock they immediately took steps to dismiss the appeal.

Petitioner Young—having lost the "foot-race"—sought desperately to prevent the dismissal. He appeared before the Circuit Court of Appeals in Cincinnati, and there was an extensive hearing before that court.

Petitioner Young—at that time, and in that hearing—sought (a) to intervene in the appeal, as a Preferred Stockholder; and (b) to object to the dismissal of the appeal filed by the respondents.

The Circuit Court of Appeals after full hearing, decided that Bradley and Murphy had the right to dismiss the appeal of the respondents; and with respect to Petitioner Young's application to intervene, it made this order:

"The application of Robert R. Young for leave to intervene, having been considered by the Court, it is now ordered that said application be and the same is denied." (16.)

With the dismissal of the appeal, the Corporate Reorganization became final, and on the day following (March 12, 1942), Bradley and Murphy borrowed \$566,000.00 from The National City Bank of Cleveland with which they immediately made tender to the corporation to which they owed the money, and in which Petitioner Young was dominant. (Ad Interim Report of Master, Findings Nos. 35-40, p. 246.)

Petitioner Young having failed to prevent these respondents Potts and Boag from selling the stock to Bradley and Murphy—and having thus failed to keep the appeal pending,—and having also failed to secure permission to intervene in the appeal, he filed an application in the Bankruptcy proceedings before the District Court for authority to file an action against Potts and Boag to compel them to disgorge to the Higbee Company or its Preferred Stockholders the amount which they had received from Bradley and Murphy in excess of the reasonable market value of their stock. (2, 3.)

In support of this application Petitioner Young claimed that in making their appeal, Potts and Boag were acting in a representative and fiduciary capacity on behalf of *all* the Preferred Stockholders, and that they therefore owed to those other Preferred Stockholders, as *cestuis que trust*, the profits of the transaction.

The basic premise of this claim—that Potts and Boag were acting on behalf of all the Preferred Stockholders in making the appeal—was obviously a factual rather than a legal issue. It was referred to a Master who made a long report.

This Report, with Special Findings of Fact, and Conclusions of Law is in the Record at pages 228-248.

In substance, however, it found specifically against the Petitioner's claims of fact, and found to the contrary that the appeal which was filed by Potts and Boag was filed by them in their individual rights and capacities; and was *not* filed by them on behalf of any of the other Preferred Stockholders.

"10. Upon their resignation as members of said Committee, Potts and Boag solicited the support of other preferred stockholders to join them in opposing the provisions of the Amended Plan of Reorganization relating to the treatment of the Junior Indebtedness; which solicitation was unsuccessful and *no one joined with or authorized Potts and Boag to act for them.*

11. Thereafter, and on December 18, 1940, and thenceforth until the dismissal of their appeal by the Circuit Court of Appeals on March 11, 1942, Potts and Boag, *solely in their individual capacities, and not as representing other interests or rights, prosecuted their objections and exceptions* to the confirmation of the Amended Plan of Reorganization.

* * * * *

13. At the time of filing of these exceptions *Potts invited Young to join therein and Young refused.*

14. After the institution by Young and Kirby of said suit against Bradley and Murphy on May 28, 1941, *Young stated to Potts that he was not interested in the objections and exceptions* theretofore filed by Potts and Boag to the confirmation of the Amended Plan of Reorganization because it was to his (Young's) interest to have Bradley and Murphy get all they could for said securities under the Amended Plan of reorganization so that there would be that much more for Young to try to take away from them.

* * * * *

18. On November 14, 1941, *Potts and Boag, acting on behalf of themselves only, appealed to the United States Circuit Court of Appeals from the order of the United States District Court confirming the Amended Plan of Reorganization of The Higbee Company.*

* * * * *

37. The evidence offered fails to show that Potts and Boag represented any other stockholders than themselves and in the filing of objections to the confirmation of the Amended Plan of Reorganization and *in the prosecuting of their appeal from the order of the United States District Court confirming the Amended Plan of Reorganization, said Potts and Boag acted only for themselves individually, and not as the representatives of a class and their appearance in these proceedings was at no time derivative in its nature or effect.*" (246.)

This report of the Master was confirmed (with unimportant changes) by the District Court. (252-256.)

And on appeal, that judgment was affirmed by the Sixth Circuit Court of Appeals in a memorandum opinion (264, 265) which concluded with this language:

"And it appearing from the findings of the master, confirmed by the District Court, and supported by the evidence, that Potts and Boag represented no other stockholders than themselves and acted only for themselves individually and not as representatives of a class, both in the filing of objections to the confirmation of the amended plan of reorganization and in prosecuting their appeal from the court's order confirming the amended plan of reorganization, and at no time asserted a derivative right belonging to the debtor;

It is ordered that the order of the District Court " " " be, and it is in all things, affirmed."

QUESTIONS PRESENTED.

Here also, it seems to us that the Petitioner has stated the questions which are involved in a manner which is both inadequate, and inaccurate. On page 4 of his Brief, he states the "Questions Presented" as follows:

1. After Potts and Boag had represented to the Court and to the Higbee preferred stockholders that they were acting as a committee in the interests of all preferred stockholders, can they thereafter accept and retain for themselves individually a \$100,000 consideration for permitting the dismissal of an appeal which they had taken from a decree confirming the Amended Plan of Reorganization of The Higbee Company?

2. Should Potts and Boag be required to pay over to The Higbee Company for its First Preferred Stockholders the aforesaid \$100,000 consideration which they received for permitting the dismissal of the appeal?

These questions assume that "Potts and Boag had represented" that they were acting in a representative capacity.

That assumption is contrary to the explicit findings of fact made by the lower courts.

Obviously, if the lower courts had found that the Petitioner was right in his basic claim of fact, that the appeals were filed on behalf of other stockholders, and that in making the appeals, Potts and Boag were acting in a representative or derivative capacity, the conclusion might have been otherwise.

But the real truth of the matter is that the Petitioner is now seeking to argue in this Court that the findings of fact in the trial court were contrary to the weight of the evidence.

Surely it is elementary that that matter is not now open to debate in this Court.

COUNTER STATEMENT OF QUESTIONS PRESENTED.

In contradistinction to the Statement of Questions Presented in Petitioner's Brief, we suggest that they can be more accurately stated as follows:

1. In filing their appeal, were the respondents Potts and Boag acting only for themselves—or were they acting in a representative capacity?

2. Assuming (as the lower courts have found) that they were acting only for themselves, was there any obligation, nevertheless, to account over (a) to the debtor corporation; or (b) to the other Preferred Stockholders?

3. Assuming (arguendo) that Potts and Boag could not dismiss their appeal to the prejudice of the other Preferred Stockholders without accounting over, was there any showing that those Preferred Stockholders were in fact prejudiced by the dismissal?

4. Assuming (arguendo) that there might, in some situations, be an obligation to account over to the corporation or to the other Preferred Stockholders, does that claim fail because of the particular facts of this case; specifically

- (a) because all of the other Preferred Stockholders approved the Amended Plan of Reorganization; or
- (b) because the sale of the stock was for reasons wholly irrelevant to the rights and interests of the corporation and the other Preferred Stockholders; or
- (c) because of the former decision of the Circuit Court of Appeals, acting as collateral estoppel?

COUNTER STATEMENT OF FACTS.

As already indicated, the Statement of Facts in Petitioner's Brief is, in some respects, seriously incorrect; and in others wholly inadequate and misleading. This compels us to restate the operative facts with considerable detail:

At the outset it may be pointed out that there is one basic fallacy which pervades the Petitioner's Brief, and that is the assumption that the matter is to be judged by the best possible interpretation of the evidence *from the Petitioner's point of view*.

Inasmuch as findings of fact have been made by the Master, and by the District Court (and affirmed by the Circuit Court of Appeals) which are plainly contrary to the contentions of the Petitioner, we assume that it is elementary that these findings are to be considered and tested by the best possible interpretation of the evidence *from the Respondents' point of view*.

In other words, if there is any substantial evidence in the Record to support the findings of the lower courts, it is a matter of no concern at all, that there is also other evidence from which opposite findings might conceivably have been made.

This litigation represents one phase of the almost innumerable controversies which grew out of the spectacular rise of the Van Sweringens in Cleveland finance, and their later and equally spectacular collapse.

The Higbee Company is a corporation, which for many years has operated a large department store in the City of Cleveland.

The Van Sweringens secured dominant control of this concern, and caused the store to be moved from its old location to their huge new Terminal area. In this new location, and at about the same time as the whole financial empire of the Van Sweringens was collapsing, The Higbee Company got into financial difficulties, and eventually corporate reorganization proceedings were instituted pursuant to Chapter X of the Bankruptcy Act.

These proceedings were before Judge Paul Jones, Judge of the United States District Court in Cleveland, and dragged on for a period of several years from 1938 to 1942, while the various competitive interests argued their rights to recognition in the reorganized status of the company.

On September 30, 1935, the firm of J. P. Morgan & Co. held their famous auction of Van Sweringen securities, and among other items, certain unsecured obligations of The Higbee Company (frequently referred to in the Record as *The Junior Indebtedness*) were sold to a concern known as Midamerica Corporation. This Junior Indebtedness had a face value of substantially \$1,500,000.00. (116, 239.) At the time, this concern was controlled by The George and Frances Ball Foundation. (240.)

On June 4th, 1937, the Junior Indebtedness was sold by the Ball Foundation to Charles L. Bradley and John P. Murphy for a price of \$600,000.00. Of this amount \$60,000.00 was paid in cash and the balance of \$540,000.00 was represented by a note secured by a pledge of the Junior Indebtedness. (116, 240.)

One of the principal points of controversy in the Higbee reorganization centered around this Junior Indebtedness which was thus acquired by Bradley and Murphy.

Bradley and Murphy were officers of Midamerica at the time it was bought from J. P. Morgan & Co.

Bradley was also a director of The Higbee Company at that time.

Should this claim for \$1,500,000.00 be recognized in its full amount?

Or only for the amount paid by Bradley and Murphy, to-wit, \$600,000.00?

Or not at all?

Had there been a breach of fiduciary duties by Bradley and Murphy which were owed to The Higbee Company and which affected their rights in the reorganization?

These questions were bitterly argued throughout the reorganization proceedings.

In this controversy the respondents Potts and Boag took a leading position. They owned 250 and 10 shares respectively of the First Preferred Stock of The Higbee Company, and they constantly urged that Bradley and Murphy were not entitled to any recognition whatever, so far as the Junior Indebtedness was concerned; but that if it was to be recognized at all, it should be recognized only to the extent of the money they had actually paid for it, to-wit, \$600,000.00.

In order to make his opposition effective, Respondent Potts helped to organize a protective committee which bore the name of the "New Preferred Stockholders Committee." This committee was organized in 1938, and took its name of the "New Preferred Stockholders Committee" in contradistinction to a so-called "Committee of Preferred Stockholders" which it was believed and asserted by respondent Potts was dominated and controlled by the Bradley and Murphy interests.

This so-called "New Preferred Stockholders Committee," was organized in large part by respondent Potts, and on August 8, 1939 it filed objections to the claims of Bradley and Murphy. These objections are in the Record, pp. 81-87.

So far as this "New Preferred Stockholders Committee" was concerned, there is no doubt that it, and all of the persons participant in it, purported to be acting for and on behalf of the Preferred Stockholders of the Higbee Company.

Several years of controversy ensued, and many if not most of the objections of that "New Preferred Stockholders Committee" were decided favorably to that committee.

Eventually an *Amended Plan of Reorganization* was submitted on September 27, 1940. (100.)

Respondents Potts and Boag were still dissatisfied with its terms.

But their committee, The New Preferred Stockholders Committee, despite their objections, decided to approve and support the Amended Plan of Reorganization; and the lawyers for the Committee gave official notice to the Court of that approval and support. (176.)

In that situation, with their own committee officially supporting the proposed Amended Plan of Reorganization, respondents Potts and Boag resigned from the Committee and *personally, and on their own behalf alone*, filed Objections to the Amended Plan of Reorganization. These objections were filed by them on November 22, 1940. The objections are set out in full in the Record, pp. 100-103, and their Brief in support of the Objections, at pp. 104-112.

These Objections show on their face that respondents "Potts and Boag were acting and were purporting to act for themselves alone.

"Now come J. F. Potts and William W. Boag, and represent to the court that they are the owners of 250 shares and 10 shares of the First Preferred Stock of

the Higbee Company, debtor herein; that they were until November 7th, 1940, members of the new Preferred Stockholders Committee of the Higbee Company; that they herewith file their objections to the Amended plan of reorganization of The Higbee Company, dated, September 27th, 1940, as follows * * *."

A month later, these respondents Potts and Boag,—still acting only for themselves—filed an application to have Special Counsel appointed to represent the debtor, The Higbee Company, and in this application they contended that The Higbee Company was represented by lawyers who were unduly dominated by the interests seeking to gain recognition for the Junior Indebtedness.

This Application, and the briefs in support of it, appear in the Record, 112-121, and also show on their face that respondents Potts and Boag were acting and were purporting to act, only for themselves.

Despite their personal objections, and arguments, the Special Master to whom the matter had been submitted, made a Report recommending approval of the Amended Plan of Reorganization; and on Febr. 10, 1941, respondents Potts and Boag filed their own Objections and Exceptions to this Report of the Special Master.

These Objections and Exceptions, and the Brief in support of them are in the Record, pp. 121-146, and they also are quite clearly made and urged by the respondents Potts and Boag *in their own personal behalf*.

"Now come J. F. Potts and William W. Boag, holders of 250 shares and 10 shares respectively of the First Preferred Stock of the debtor, and respectfully object and except to the ad interim Report of the Honorable William B. Woods, Special Master recommending approval of the Amended Plan of Reorganization, etc. * * *." (122)

A copy of these Objections and Exceptions and Brief in support, was served upon "Harvey O. Mierke, Chairman

of Committee of Preferred Stockholders"; and also upon "Bloomfield & Orr, Attorneys for New Committee of (Preferred) Stockholders." (125.)

On May 27, 1941, Judge Paul Jones decided to remand the matter to the Special Master for a further consideration of some phases relating to the Junior Indebtedness. His opinion appears in the Record, 172-174, and his formal order of remand was signed on June 10, 1941. (174.)

The Higbee Company filed a Motion for New Trial, and respondents Potts and Boag filed a Brief opposing the granting of this Motion. This Brief was also filed on their own behalf, and did not purport to be on behalf of any one else. (164-171.)

On July 2, 1941, Judge Jones vacated his order of June 10th, 1941. (174.)

It was at this point, that respondents Potts and Boag decided to try to organize another Protective Committee.

They got out a letterhead, which appears in the Record, at p. 172, and which bears the legend

INDEPENDENT PREFERRED STOCKHOLDERS'
COMMITTEE OF THE HIGBEE COMPANY.

Committee

J. FRED POTTS

WILLIAM W. BOAG

JOHN W. JOUGHIN

Counsel

J. FRED POTTS

JOHN H. MCNEAL

On this letterhead they sent out a letter to the Preferred Stockholders urging them to oppose the Amended Plan of Reorganization and to vote against it. (172-178.)

Despite this effort to interest other Preferred Stock Holders in fighting the Amended Plan of Reorganization, and despite the fact that they had a few letters of inquiry from other Preferred Stock Holders (187) there were no others who voted to disapprove the Plan.

As stated by Judge Jones in his Memorandum of June 10, 1943, (252):

"The Higbee Company Plan of reorganization long since has been confirmed and *was acceptable to every interest, except to preferred stockholders Potts and Boag* who appealed from the order of confirmation of this Court."

In an earlier memorandum of Sept. 3, 1942 (dealing with the application of respondent Potts for counsel fees—and *offered in evidence by the Petitioner*) Judge Jones said categorically:

"*All preferred shareholders accepted the Plan of Reorganization, after amendment in several respects, except these applicants (Potts and Boag).*" (221.)

Or as stated by the Special Master, in his report of March 24, 1943 (233):

"³Potts and Boag had the right as individuals to be heard on the confirmation of the Plan of Reorganization of this Debtor. In the proceeding *they did not claim they were acting for anyone but themselves.* While the proof shows they sought to form a committee, and sought help from others, *the evidence fails to disclose that they were ever authorized to act for any other person, and were acting solely on their own behalf.*" (233.) (Emphasis added.)

Indeed, John W. Joughin, the third member of their proposed Independent Committee, also abandoned the struggle, and left the field to Potts and Boag, alone.

"Q. Well now, after Mr. Joecken had in effect withdrawn from this committee, what did you and Mr. Boag do?

A. We filed our Notice of appeal." (186.)

Their Notice of Appeal (181) shows plainly that it was filed by respondents Potts and Boag in their individual capacity, and *not* as the Petitioner constantly assumes, on behalf of a Committee, or on behalf of the class of Preferred Stockholders.

While this Appeal was pending in the United States Circuit Court of Appeals, Bradley and Murphy found themselves in a serious financial jam, which compelled them to pay almost any sum for the stock of respondents Potts and Boag.

These reasons were wholly irrelevant to the merits of the Appeal, and throw a very revealing light upon the validity of the claims of the Petitioner to be representing the interests of the Preferred Stockholders in this litigation.

When Bradley and Murphy acquired the Junior Indebtedness, from the Ball Foundation, on June 4th, 1937, they paid \$60,000.00 in cash and signed a note calling for the further payment of the balance of \$540,000. This note was secured by a pledge of the Junior Indebtedness.

This note representing the balance of \$540,000.00 was in turn transferred by the Ball Foundation to interests which were controlled by the Petitioner, Robert R. Young. This transfer to Young was on March 2, 1942. (49.)

There was at that time bitter hostility between Petitioner Robert R. Young on the one hand, and respondent Charles Bradley on the other.

On the day following, March 3d, 1942, Petitioner declared the demand note due.

Q. Now you acquired it on March 2. When was it that you declared the note due and notified Bradley and Murphy that you were going to sell the collateral?

A. We sent notices under date of March 3. (50.)

They not only sent notices that the demand note was due, but that it would be sold at public sale on the Cleveland Courthouse steps ten days later, on March 13th, 1942. (21.)

The immediate further history of the matter is set out succinctly in the Master's Special findings:

"6. Under date of March 3, 1942, Young and Kirby
* * * caused Midamerica to serve upon Bradley and

Murphy a notice in writing to the effect that it (Midamerica) was now the owner of the Bradley-Murphy note; that it declared the note immediately due and payable; that it would sell the collateral (consisting of said securities) on March 13, 1942; and that it reserved the right to bid for and purchase the collateral at the sale.

7. The Bradley-Murphy note on its face provided that in the event of public sale at a price greater than the amount due thereon, the holder of the note was under no obligation to pay or account to the makers thereof for such overplus or any part thereof."

(We interrupt the quotation from the Master's Report, to point out that by virtue of this provision in the note, Petitioner Young was in a position to bid at public sale up to *any* amount with entire impunity, since there was no duty to account for the proceeds, no matter how high the price might go.)

"20. The avails of said securities (in The Higbee Company under the Amended Plan of Reorganization) upon final confirmation thereof, constituted ample security for financing the payment to Midamerica of the Bradley-Murphy note in the principal amount of \$540,000.

22. Young and Kirby knew, at the time when they caused Midamerica to serve on Bradley and Murphy said notice in writing on March 3, 1942, that the pendency of this appeal cast doubt upon the value of the Junior Debt of The Higbee Company under the terms of the Amended Plan of Reorganization." (242, 243.)

With the appeal pending, the banks would not lend Bradley and Murphy the money which they needed to save themselves.

"Negotiations had been carried on by Bradley and Murphy for the purpose of borrowing sufficient funds to finance the payment of the \$540,000 note and we had been assured that the collateral was of sufficient value

to support a loan of that amount of money, but that because of the appeal which had been filed on behalf of Potts and Boag the final approval of the Amended Plan of reorganization was held up * * * and so long as that appeal was in existence the collateral was of little value for the purposes of security in borrowing large sums of money * * * and that as soon as the plan of reorganization was finally confirmed it would be a simple matter for Bradley and Murphy to finance the payment of the \$540,000 note." (Testimony of Wykoff, 21, 22.)

It was in the light of this situation that the "foot race" took place between Petitioner Young, and Bradley and Murphy. As expressed by witness Wykoff, one of the lawyers for Bradley and Murphy:

"* * * As soon as the Realty Company had acquired the \$540,000 note a *foot race* took place between Bradley and Murphy on the one hand, and Young and his associates on the other, to acquire the Potts and Boag stock and * * * it was rather obvious that perhaps we had run a little faster * * *." (Testimony of Wykoff, 22.)

When both groups were bidding for the stock, Petitioner Young made it clear that he would bid as high as Bradley and Murphy for it.

"Q. What occurred * * * when you (Potts) were talking with Mr. Purcell (lawyer for Mr. Young) that day?

A. * * * I told Mr. Purcell that we had been made an offer for our stock. It wasn't hay; that I didn't feel like telling him what it was; and he said that *his client would meet any offer that we had* * * *." (32.)

This was made the subject of a special finding (No. 26) by the Master who found:

"26. Thereafter, Young's counsel, Robert W. Purcell, conferred with Potts and Boag, at which time Purcell stated that Young would meet any offer that

Potts and Boag might receive from other sources for said Preferred Stock." (244.)

While Petitioner Young was thus trying to prevent Bradley and Murphy from getting the Potts-Boag stock, he was also busy trying to prevent them from borrowing money with which they might save themselves.

Young's lawyer (Mr. Purcell) told Potts in the course of their negotiations that they were "going to put propaganda on the street in an effort to prevent the borrowing of that money" by Bradley and Murphy. (32.)

The Record contains the statements which Young caused to be printed in public newspapers, threatening dire consequences to any one who might aid Bradley and Murphy. This evidence is in the Record at pp. 44, 77-79.

For example Mr. Purcell (Mr. Young's lawyer) testified:

"Q. He (Young) put advertisements in the Cleveland papers and in the New York papers that he would hold anybody responsible who assisted them to finance?

A. Well, he put certain notices in the papers. I didn't say that ~~was~~ propaganda." (44.)

One of the statements (published in The Cleveland News) and formally issued by Young, concluded with this threat:

"It was and is the theory of our suit that the conduct of Bradley and Murphy constitutes a gross breach of fiduciary duty, and that any one joining with or assisting Bradley and Murphy in the perpetration or continuation of this wrong is equally liable to us. We shall hold any one so doing strictly accountable." (79.)

This statement was published on March 9, 1942, seven days after Young acquired the Bradley-Murphy note, six days after he had declared it due, and four days before he planned to sell it at public auction, at which time he expected to bid it in.

This was also two days before the Sixth Circuit Court of Appeals permitted dismissal of the Potts-Boag appeal, and refused to permit Young to intervene to keep the appeal alive.

A R G U M E N T.

S U M M A R Y O F A R G U M E N T.

1. The question as to whether or not respondents Potts and Boag, in filing their appeals, were acting for themselves only, or were acting in a representative or fiduciary capacity is a factual question only and inasmuch as it has been plainly and decisively answered by the lower courts is not open to argument in this Court.

2. When a stockholder files his individual appeal from confirmation of a plan of reorganization, he has the right to prosecute that appeal or dismiss the appeal without reference to the rights, or the interests, or the wishes of the corporation itself, or any other person. This is true because it is inherent in the right of the appeal itself, which is given by statute to each individual stockholder who is aggrieved, or fancies himself aggrieved.

3. Assuming (for the sake of argument) that there might be a duty to account over to the Corporation, or to some class of security holders who are especially and prejudicially affected by the dismissal of an appeal, this duty to account over could not in any event arise without an affirmative showing that the corporation or the class of security holders *had actually been prejudiced by the dismissal*. There was no such showing in this case.

4. Assuming further (for the sake of argument) that there might be a duty to account over to the Corporation, or to some class of security holders who were especially affected by the dismissal of the appeal, this duty to account over could not arise in this case because of three facts, any one of which would be fatal to the claims of the petitioner, to-wit:

- (a) All of the Preferred Stockholders (except only Potts and Boag) approved the Amended Plan of Reorganization;
- (b) The Sale of the Stock by Potts and Boag, and the high price which was secured, was for reasons wholly irrelevant to the rights or interests of the Corporation or the other Preferred Stockholders;
- (c) The earlier decision of the Circuit Court of Appeals denying the right of Petitioner to intervene in the appeal, and permitting Bradley and Murphy to dismiss the Potts-Boag appeal serves as a collateral estoppel against the efforts of Petitioner to re-litigate the matter in this proceeding.

I. IN FILING THEIR APPEALS WERE RESPONDENTS POTTS AND BOAG ACTING ONLY FOR THEMSELVES, OR WERE THEY ACTING IN A REPRESENTATIVE CAPACITY?

As already stated in the Summary of Argument, we do not concede that this question can be raised in this Court.

The findings of the Master (228-248) which were approved and confirmed by the District Court (252) and affirmed by the Circuit Court of Appeals (264, 265) leave no room for further argument.

It must be accepted, therefore, that the Potts-Boag appeal was filed by them individually, in their own individual behalf, and not in any sense in a representative or derivative capacity.

II. ASSUMING THAT THE POTTS-BOAG APPEAL WAS FILED BY THEM PERSONALLY, AND IN THEIR INDIVIDUAL CAPACITY ONLY, DID THEY HAVE THE RIGHT TO DISMISS THE APPEAL, OR SELL THEIR STOCK TO SOME ONE ELSE WITH THE INTENTION OF DISMISSING THE APPEAL?

We submit that this question can not be decided by describing what happened in this case as the "sale of an appeal" to use the rhetorical and invidious phrase which is repeatedly employed by Petitioner in his brief.

It is perfectly obvious that a substantial part of the price which Potts and Boag received for their stock, was because of the plan of the buyer to cause the dismissal of their appeal.

It may be assumed (we should think) that the statute which gives the *right* to each aggrieved stockholder to file an appeal, does not impose upon him the *duty* (if he once files Notice of Appeal) to prosecute that appeal energetically, or indeed, to prosecute it at all.

Under Section 206 of Chapter X of the Bankruptcy Act, "any * * * stockholder of the debtor" has the "right to be heard on all matters arising on a proceeding under this Chapter * * *."

That "right" has frequently been construed to include the right of appeal, without any formal order of intervention. *In re Day & Meyer, etc.*, 93 Fed. (2d) 657; *In re Keystone Realty Holding Corp.*, 117 Fed. (2d) 1003; *Dana v. Securities Exchange Comm.*, 125 Fed. (2d) 542.

Surely it can not be argued that this "right" of appeal means that after the Notice of Appeal has been filed, there is a "duty" of energetic prosecution of the appeal.

If a stockholder files a Notice of Appeal, and then changes his mind, must he secure permission of the court to abandon it? or permission of the corporation? or permission of the other stockholders?

If he must prosecute it, how energetic must he be? And if impecunious, how shall he finance the prosecution of his own appeal?

It seems to us that the mere statement of these questions carries their own answer.

We submit that (unless and until the Congress shall provide otherwise) the *right* of appeal includes also the right to control the prosecution of the appeal; and the right also to discontinue or to refuse to prosecute it, upon any terms that seem acceptable to the appellant—irrespective of whether those terms are advantageous to him or not.

We submit further, that if the original appellant may refuse to prosecute his appeal for any reason that seems good to him, or for no reason at all, he may sell his stock, and that his assignee has the same unlimited right and power.

In a Brief filed by The Securities and Exchange Commission in support of certiorari in this case, it was urged that this sort of thing must be discouraged by requiring the profits of the transaction to be paid over to the Corporation or to the other Preferred Stockholders, or very dire results may happen in some cases.

"It is our position on the merits that these liberalized provisions for investor participation must be interpreted as carrying with them concomitant responsibilities * * *. The decision (of the courts below) will have the effect of encouraging participants in reorganization proceedings to object to reorganization plans and to prosecute appeals therefrom even where they have no basis for believing that such objections are sound * * *." (Brief of S. E. C., pp. 12, 13.)

We should have thought that this criticism of the right of appeal would be more properly addressed to the legislative body which created the right.

Surely it goes without saying that the right of appeal cannot be given to "any * * * stockholder" without having that indiscriminate right subject to some occasional abuse. But we doubt if the responsibility for curing those abuses can be properly (or indeed wisely) placed in the hands of the courts.

It is the general rule—so far as we have been able to find—that when the law creates the general right of an appeal for a litigant, that right of appeal includes the right of "control" of the appeal. And that in turn includes the right of prosecution, or continuance, or dismissal.

We suggest as somewhat analogous to the situation at bar, the case of a disputed will in probate proceedings.

If a will is held to be valid but only one heir appeals, it is obvious that all of the other heirs will profit if the appeal is successful. In such a will contest in which only one of the heirs has filed an individual appeal,—if that appellant concludes to dismiss his appeal (for a good reason, or for a poor reason, or for no reason at all), have the other heirs (who could also have filed their appeals) any ground for complaint?

In *Storey v. Storey*, 120 Ills. 244, 11 N. E. 209 (1887), the Supreme Court of Illinois had occasion to consider that general situation. A will had been denied probate, and at a time when there was only one appeal pending, it was held that that appellant had the right to dismiss his appeal, even though by so doing he destroyed the rights of others who had no appeal pending. On this point the Supreme Court of Illinois said (pp. 216, 217):

“It would be manifestly unjust * * * to take from an appellant through whose affirmative action and upon whose sole pecuniary responsibility an appeal had been perfected all control of such appeal in the appellate court * * *.

“It is contended with great earnestness that Mrs. Farrand ought not to be permitted to withdraw her appeal * * * and thereby forever defeat the probate of this will * * *.

“To this it must be answered: If such would be the legal consequences, it does not lie in the mouth of Mrs. Storey to complain. The law gave her the undoubted right to appeal from the decision and judgment of the probate court denying probate of the will * * *.”

To the same effect see *Senn v. Grundling*, 218 Ill. 458, 75 N. E. 1020 (1905), where it is said:

“Any person interested in the will, may appeal to the circuit court. The party taking an appeal has a right to control his appeal, and to dismiss it at his pleasure, and in that event the judgment of the probate court is left in full force and effect.”

III. ASSUMING FOR THE SAKE OF ARGUMENT THAT POTTS AND BOAG COULD NOT DISMISS THEIR APPEAL—TO THE PREJUDICE OF THE OTHER PREFERRED STOCKHOLDERS—WITHOUT ACCOUNTING OVER TO THEM FOR THE EXCESS PRICE OF THE STOCK, WAS THERE ANY SHOWING THAT THE CORPORATION OR PREFERRED STOCKHOLDERS WERE IN FACT PREJUDICED BY THE TRANSACTION?

It seems to us that the answer to this is obviously "No."

The Petitioner showed without dispute that Potts and Boag made a *profit*.

But that does not prove—nor indeed does it tend to prove—that the corporation, or the Preferred Stockholders had a reciprocal *loss*.

So far as this Record goes, there is nothing whatever to indicate that the dismissal of the appeal was prejudicial to the corporation or to the Preferred Stockholders in the slightest degree.

Surely there is nothing in the situation which requires the respondents to account over to the Preferred Stockholders on the major premise that the respondents' conduct has harmed them, when there is (in fact) not a scintilla of evidence of such harm.

Every one of the Preferred Stockholders (except only Potts and Boag) voted to accept the Amended Plan of Reorganization. (Memorandum of District Judge, 252.)

Even Petitioner Young was in favor of it. (Special Findings, No. 13, p. 242.)

How can it be argued that these Preferred Stockholders were prejudiced by the dismissal of an appeal which served to delay a Reorganization that they all favored?

Of course the real truth of the matter appears in this Record with entire clarity. The dismissal did *not* prejudice or harm the corporation at all, or the interests of the Preferred Stockholders at all.

The only harm or prejudice was to Petitioner Young, in his private vendetta against Bradley and Murphy and his campaign to oust them from control of The Higbee Company.

IV. ASSUMING HOWEVER (FOR THE SAKE OF ARGUMENT) THAT THERE WAS A DUTY TO ACCOUNT OVER TO THE CORPORATION OR TO THE PREFERRED STOCKHOLDERS FOR THE EXCESS PROFITS DERIVED FROM THE SALE OF THE STOCK, IS THIS RIGHT DEFEATED BY THE FURTHER FACTS IN THIS CASE, towit,

(a) The fact that all of the Preferred Stockholders (except only Potts and Boag) approved the Amended Plan of Reorganization; and by

(b) The fact that the sale of the stock for an excessive price was for reasons wholly foreign to the rights or interests of the Corporation or the other Preferred Stockholders; and by

(c) The fact that in an earlier proceeding before The Circuit Court of Appeals, the Petitioner had sought unsuccessfully to intervene in the Potts-Boag appeal and that proceeding serves as a collateral estoppel against the effort by the petitioner to litigate the matter further.

As already pointed out, *all* of the Preferred Stockholders (except only Potts and Boag) voted for approval of the Amended Plan of Reorganization. See memorandum of District Judge, p. 252.

How then can these same Preferred Stockholders be heard to complain of the dismissal of an appeal which put into immediate effect the very Plan of Reorganization which they all desired?

In *Bank v. Flershem*, 290 U. S. 504, 521 (1933) this Court had occasion to consider the rights of security holders who had consented to and approved a Plan of Reorganization which was subsequently held invalid on

appeal; and it was held that such security holders could not have any of the benefits of the successful appeal nor could they complain that the successful appellants came out better than the others.

“The debenture holders, who by assenting to the Plan, cooperated with the Corporation and the Reorganization Committee, are in no position to complain that these petitioners will fare better than they. Compare *Davis v. Virginia R. and Power Co.*, 229 Fed. 633, 642.”

Applying the principle of the *Flershem* case to our case at bar, the *only* persons who could have received the benefits of the appeal were the appellants themselves.

All of the other Preferred Stockholders had disqualified themselves from challenging the Amended Plan of Reorganization.

Since the appellants certainly had the right to dismiss their appeal *so far as their own individual rights recoverable through the appeal*, were concerned, it would seem that under the rule of the *Flershem* case, there is no one with any right to complain about the dismissal of the appeal.

We submit further that the fact that the sale of the stock for a high or excessive price was shown to be for reasons wholly foreign to the interests of the corporation or other preferred stockholders is ⁸also fatal to the contentions of the Petitioner.

We suggested at an earlier point in this Brief that the burden was upon the Petitioner to prove that the corporation or the other preferred stockholders had been prejudiced by the sale of the stock and the subsequent dismissal of the appeal. But we now carry the point one step further. Not only did the Petitioner *not* prove (what we conceive to have been part of his case) that the preferred stockholders suffered loss—but on the contrary, it was proved clearly and plainly that they did *not* suffer loss. The

evidence established plainly that the high price paid was because of the private struggle between Young on the one hand and Bradley and Murphy on the other—a struggle in which the corporation and the other preferred stockholders had no concern at all.

Finally, it is in the Record and undisputed, that before the Potts-Boag appeal was dismissed, Petitioner Young appeared before The Circuit Court of Appeals and sought to prevent the dismissal, and asked leave to intervene in the appeal. (54, 71.)

The Circuit Court of Appeals declined to allow him to intervene; and after full hearing, did permit Bradley and Murphy to dismiss the Potts-Boag appeal. (72, 73.)

Should Young be permitted to re-litigate the propriety of this dismissal?

In *U. S. v. Moser*, 266 U. S. 236 (1924) this Court said (p. 242):

“A fact, question, or right distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law.”

The Petitioner filed his application for leave to intervene in the original Potts-Boag appeal (71) and also filed (54) an application for a hearing on the dismissal of the appeal before any action was taken on the appeal.

In support of these applications he filed a long memorandum (56-59) in which he made essentially the same claims that are now made in this proceeding.

The Circuit Court of Appeals on March 11, 1942 (72, 73) decided his contentions adversely and denied him the right to intervene (although he was asking to intervene on behalf of all the Preferred Stockholders) and despite these same contentions, ordered the appeal dismissed.

In the light of these conceded facts how can Petitioner be heard to litigate the same questions further?

See Article by Austin Wakeman Scott on Collateral Estoppel by Judgment, 56 *Harv. L. R.* 1 (1942).

One of two things must be true.

Either the former judgment in the Circuit Court of Appeals was predicated on a determination that Potts and Boag (and their assignees) had the unqualified *right* to dismiss their appeal irrespective of the profits to them in the transaction; *or* the facts of the transaction which were shown to the court (the same facts as are in this Record) were not such as to show any prejudice to the Preferred Stockholders.

Since the former litigation revolved around exactly the same facts as we have now, we submit that upon the simplest and most elementary principles of collateral estoppel by judgment the Petitioner should not now be allowed to re-litigate the matters which he submitted to the Circuit Court of Appeals at the time of the dismissal of the Potts-Boag appeal.

CONCLUSION.

For the reasons stated we submit that the judgment of the lower courts was right and should be affirmed.


Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM 1944.

No. 342.

ROBERT R. YOUNG,

Petitioner,

VS.

THE HIGBEE COMPANY,

WILLIAM W. BOAG and J. F. POTTS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF RESPONDENT J. F. POTTS

In Answer to Brief of

The Securities and Exchange Commission.

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INTRODUCTORY.

This Brief is in answer to the Brief filed by The Securities and Exchange Commission.

THE SINGULAR (AND CONTRADICTIONARY) POSITIONS TAKEN BY S. E. C. THROUGHOUT THIS LITIGATION.

Inasmuch as the Securities Exchange Commission (without becoming a party to this proceeding, or to the appeal) has now filed a Brief which it asks the Court to consider (if not filed as of right, then as *amicus curiae*), in which it strongly supports the position of the Petitioner, it may not be inappropriate to point out some of the

astonishing inconsistencies which have characterized its attitude in this proceeding.

1. **At the outset it cordially approved the Amended Plan of Reorganization, and recommended its confirmation.**

This is conceded in its Brief. (p. 3)

2. **After Potts and Boag had filed their appeal, it approved the dismissal of the appeal, when that controversy was before the Sixth Circuit Court of Appeals.**

The S. E. C. is discreetly silent about this in its brief, but the facts are in the record too plainly for dispute.

At the very time the Petitioner Young was objecting to dismissal of the Potts-Boag appeal, and seeking to intervene allegedly on behalf of himself and all of the other Preferred Stockholders, the S. E. C. sent a telegram to the Circuit Court of Appeals approving dismissal of the appeal. This appears in the testimony:

“Q. Proceed.

A. Yes; there was one other matter * * * A telegram, which Judge Simons showed to all of us, came to him from the Securities and Exchange Commission in which they stated that they had received no notice of the application to dismiss, but that in their opinion the plan was fair and equitable * * *

Q. Proceed, Mr. Wykoff.

A. Well, all I intend to say in this recital is that Judge Simons read the telegram to us.” (Testimony of Wykoff, 22, 23.)

The Telegram is in evidence. (79, 80.)

“A. J. W. MENZIES, CLERK
UNITED STATES CIRCUIT COURT OF APPEALS
FEDERAL BUILDING
CINCINNATI, OHIO

RE: THE HIGBEE COMPANY

SECURITIES AND EXCHANGE COMMISSION NOT NOTIFIED UNTIL TODAY OF MOTION TO DISMISS APPEAL FROM ORDER CONFIRMING REORGANIZATION PLAN ALTHOUGH COMMISSION IS A PARTY TO THE PROCEEDING.

NO OBJECTION TO DISMISSAL OF APPEAL, HOWEVER, SINCE WE CONSIDER PLAN FAIR AND FEASIBLE FOR REASONS OUTLINED IN OUR ADVISORY REPORT.

SECURITIES AND EXCHANGE COMMISSION
Richard B. Ainsworth, Attorney,
Cleveland Regional Office."

This approval of the dismissal by S. E. C. was made the subject of Special Finding No. 34 (245).

3. **After the Potts-Boag appeal had been dismissed by the Circuit Court of Appeals, and Potts filed an application asking fees for his work in reorganization, S. E. C. took the position that Potts had represented nobody but himself.**

In order to understand this point, it is necessary to point out that after the Potts-Boag appeal had been dismissed, a claim was made by Potts and by his lawyer John H. McNeal, that they were entitled to a substantial allowance because of the great improvement in treatment which had been achieved for the security holders as a result of their services.

In other words, the final Amended Plan of Reorganization was much more favorable to the Preferred Stockholders than the original Plan.

This application by Potts for fees was disallowed by the Master, and the disallowance was adopted and confirmed by the District Court.

But in the proceedings on this application, the S. E. C. took the position that Potts—in real truth—in the proceed-

ings, had represented nobody but himself. That seems rather curious in the light of its present contentions.

At any rate, this is what S. E. C. said *at that time*.

"We believe that it will assist the Court if we briefly recapitulate the facts and circumstances which provide the background for the issues presented by the objections which Potts and McNeal have filed to the Master's reports. * * *

The applicant (Potts) has testified in substance that he resigned (from the New Preferred Stockholders Committee) because of differences which he had with the committee concerning the 1940 plan, several features of which he disapproved.

This conflicts with the version of the facts given by Mr. L. A. Bloomfield of counsel for the committee. Mr. Bloomfield testified that 'the basic reason that Mr. Potts and Mr. Boag left the Preferred Stockholders' Committee, for which we were counsel, was that both Judge Orr and myself were convinced that Mr. Potts was *not* representing all the preferred stockholders, and we finally reached the conclusion that Mr. Potts was representing himself.'

The events which transpired subsequently, tend to confirm Mr. Bloomfield's explanation." (From Memorandum filed by S. E. C. opposing allowance of fees to Potts, 216, 217.)

In other words, at that time, the S. E. C. was taking the position that Mr. Bloomfield, the lawyer for the committee, was right when he said that Potts did not represent anybody but himself; and that therefore it would be improper for him to be paid any fees for his acts.

4. It conceded (in the same memorandum) that the money received by Potts and Boag had no relationship to the merits of the appeal.

"As a result of circumstances in no way related to its merits, the appeal suddenly acquired a substantial nuisance value." (Memorandum of S. E. C. 218.)

5. **When the Petitioner Young filed the application which is the basis for this proceeding, the S. E. C. asserted that the District Court had no jurisdiction to entertain it.**

At the outset of the hearing before the Master, counsel for S. E. C. made the following statement:

“Mr. Nordstrom: * * * The position of the Commission is the same as it has been in the past * * * and if this application is, as I understand it, an application only for an accounting in behalf of the preferred shareholders, that we believe that the Court is without jurisdiction to consider that matter.” (9.)

6. **The S. E. C. took no exceptions to the report of the Master; and made no appearance either before the District Judge or before the Circuit Court of Appeals.**

Now—in the Supreme Court of the United States—for the first time—it contends that the matter is of tremendous importance, although it was not of enough importance for it to appear or to take any part in the lower courts.

Now—for the first time—it contends that the dismissal of the appeal was a dreadful wrong to the Preferred Stockholders, although it sent a telegram to the Circuit Court of Appeals approving the dismissal at the time that question was being considered.

Now—for the first time—it contends that Potts and Boag in filing the appeal were acting as fiduciaries and in a representative capacity, although when Potts was asking for fees for his championing the cause of the Preferred Stockholders at a time when he was concededly a member of and active in one of the Committees, the S. E. C. pooh-poohed his claims and said in its Memorandum that it agreed with the counsel for the committee that Potts really never represented anybody but himself.

SOME MISSTATEMENTS OF FACT.

There are a few statements in the Brief of S. E. C. that seem to us inaccurate or seriously misleading, and which therefore require comment.

1. "For the purpose of this brief, we assume that the court below was correct in holding that Potts and Boag, as a committee, never received specific authority from other stockholders." (S. E. C. Brief, p. 5.)

This apparent concession is, in fact, a seriously misleading half-truth.

The language would imply that the court did not decide squarely whether "Potts and Boag, as a committee" may have received *implied* authority, or *inferential* authority.

The facts are plainly otherwise.

The Master found (and the District Court confirmed) that Potts and Boag were not a "Committee" at all in taking their appeal; and that they were acting only for themselves.

"10. Upon their resignation as members of said Committee, Potts and Boag solicited the support of other preferred stockholders to join them in opposing the provisions of the Amended Plan of Reorganization * * *; which solicitation was unsuccessful and no one joined with, or authorized Potts and Boag to act for them.

11. Thereafter * * * Potts and Boag, *solely in their individual capacities* and not as representing other interests or rights, prosecuted their objection and exceptions to the confirmation of the Amended Plan of Reorganization.

.

18. On November 14, 1941, Potts and Boag, *acting on behalf of themselves only*, appealed to the U. S. Circuit Court of Appeals * * *

.

37. The evidence offered fails to show that Potts and Boag represented any other stockholders than themselves; and in the filing of objections to the con-

firmation of the Amended Plan of Reorganization, and in the prosecuting of their appeal * * * *Potts and Boag acted only for themselves individually, and not as the representatives of a class* and their appearance in these proceedings was at no time derivative in nature or effect." (241, 242, 246.)

2. "In failing to make any effort to prevent other security holders from being lulled into sleeping on their rights, in reliance upon the assurance that they were continuing to act for the security holders, Potts and Boag are in no position to contend that they were free to profit from the sale of their appeal by the device of appealing in their individual names." (S. E. C. Brief, p. 21.)

This paragraph makes two statements:

(a) Potts and Boag "lulled" other preferred stockholders into a feeling of confidence, so that they neglected to prosecute their own appeals, and instead slept on their rights.

(b) Potts and Boag gave, by their negative failure to inform these other share holders to the contrary, "assurance that they were continuing to act" for them.

Both statements are erroneous.

How, for example, could Potts and Boag "lull" Petitioner Young into a sense of security, when Petitioner Young did not want the appeal filed, and specifically refused to have anything to do with their objections? (Special Finding of Fact No. 13, R. p. 242.)

How could ~~Potts~~ Potts and Boag "lull" any of the other Preferred Stockholders into a sense of security, so that they slept on their rights, and neglected to prosecute appeals, when every one of them (like Petitioner Young) was in favor of the Amended Plan? and wanted it to go into effect?

All this talk about the Preferred Stockholders who were "lulled" into a false sense of security is so much

nonsense. They all refused to help Potts and Boag in his opposition to the Amended Plan. They were all in favor of the Amended Plan.

As the District Judge puts it:

"All preferred shareholders accepted the plan of reorganization after amendment in several respects, except these applicants (Potts and Boag). (Memorandum of Judge Jones, p. 221.)

*"The Higbee Company plan of reorganization long since has been confirmed, and was acceptable to every interest except to Preferred Stockholders Potts and Boag, who appealed from the order of confirmation of this court. * * *"* (Memorandum of Judge Jones, 252.)

If it is true as the District Judge says that "all preferred shareholders * * * except these applicants" Potts and Boag were satisfied with and approved the Amended Plan, how could they be "lulled" into "sleeping on their rights" by the fact that Potts and Boag did not send them all affirmative statement that he was acting only for himself.

3. "In this case Potts and Boag, by jettisoning the rights of others for their own gain, brought about a result which violates a fundamental principle of bankruptcy reorganization * * *." (S. E. C. Brief, 21, 22.)

Can a man who approves a plan of reorganization, and who is satisfied with it, have his "rights" "jettisoned" by the dismissal of an appeal which he did not wish filed?

We should think the answer would be in the negative.

If that is true, then certainly nobody had his rights "jettisoned."

A R G U M E N T.

In the portion of its brief devoted to "Argument," the S. E. C. states its case as follows:

- I. The Appeal by Potts and Boag was essentially representative in character and subjected them to control of the Reorganization Court.
- II. It is inequitable and contrary to the aims of Bankruptcy reorganization to permit Potts and Boag to retain the fruits of their sale of the appeal.
- III. Potts and Boag should be directed to pay over to the debtor the consideration they received for selling the appeal.

I. THE APPEAL BY POTTS AND BOAG WAS ESSENTIALLY REPRESENTATIVE IN CHARACTER AND SUBJECTED THEM TO CONTROL OF THE REORGANIZATION COURT.

As we understand this claim, S. E. C. contends that irrespective of the *facts* which have been found by the lower courts, to the effect that Potts and Boag were acting only for themselves, and not in any representative or derivative capacity, nevertheless the appeal was "representative" *as a matter of law*.

In support of this contention, it makes some assertions of fact that seem to us doubtful and debatable. For example it says:

"Had the appeal been successful and the order confirming the plan reversed, no new plan could have been confirmed unless it eliminated or reduced the amount of debt securities to be issued for the Bradley and Murphy claim. This would have improved the position of all public stockholders entitled to share in the reorganized corporation. Except for such compensation as the bankruptcy court might have awarded Potts and Boag for effecting this result, they would not have benefited to any greater degree than other preferred stockholders." (S. E. C. Brief, p. 8.)

But is this necessarily true?

This Court has indicated in *Bank v. Flershem*, 290 U. S. 504, 521, that under some circumstances security holders who have assented to a Plan which is invalidated on appeal, may *not* share in the benefits of the appeal.

In our case at bar, it might well be true that since *all* of the Preferred Stockholders (except Potts and Boag) assented to the Amended Plan of Reorganization, the only ones who could profit by a successful appeal would be the appellants themselves.

In its brief, it says also:

"We contend that in undertaking this appeal * * * Potts and Boag * * * undertook responsibilities which they subsequently violated * * *." (S. E. C. Brief, p. 9.)

We are constrained to wonder what S. E. C. conceives to be those "responsibilities" which Potts and Boag "undertook"?

It is obvious from the contentions of its brief that S. E. C. denies the right of an individual appellant to dismiss that individual appeal for a cash consideration.

But do those "responsibilities" include the duty of prosecuting the appeal energetically, or indeed prosecuting it at all?

We concede that this case is not to be decided by the mere citation of other difficult situations. But as illustrative of the difficulties when a *court* is asked to create obligations where the *legislature* has failed to do so, we suggest the following questions.

Could Potts and Boag be criticized, if they dismissed their appeal because they found the prosecution of it burdensome and expensive?

Could they be criticized, if they dismissed it because they decided it was not meritorious?

Could they be criticized, if they dismissed it as an act of grace and kindness, or friendship for Bradley and Murphy, when they found them in a desperate financial plight, and just about to be ruined by a gang of financial pirates?

Could they be criticized, if in addition to motives of sympathy for Bradley and Murphy when they were in desperate straits, they were offered and received a modest gratuity? Such as a directorship in the Higbee Company, for example? Or a position on the legal staff of that company?

Or to reverse the situation, and thus throw additional light upon the difficulties of defining the "responsibilities" which S. E. C. asserts Potts and Boag "undertook" when they filed their individual appeal, we may suppose that Petitioner Young had won the "foot race."

Could Potts and Boag have been criticized if they had succumbed to the blandishments of *Petitioner Young* and had sold *him* the stock for the purpose of keeping the appeal alive?

One would think that if there is any merit in the contentions of S. E. C. that that sale and that profit would have been quite as reprehensible.

And suppose further that Petitioner Young had succeeded in selling out Bradley and Murphy, as he planned, and had thus acquired control of The Higbee Company, and had thereafter dismissed the appeal himself, as he undoubtedly would have sought to do.

Could Potts and Boag have been criticized for their part in *that*?

Or could Petitioner Young be criticized?

These are not merely fanciful suppositions.

They were real alternatives which faced Potts and Boag.

Petitioner Young *tried* desperately to buy the Potts and Boag stock, and offered to meet any price offered by Bradley and Murphy. Special Finding No. 26. (244.)

Indeed it was Young himself, who ran up the price on Boag's *ten* shares to \$25,000 from \$5,000.00.

Although Potts owned 250 shares, and Boag only 10 shares, and although Potts had assumed Boag would sell for his proportional part of the price, he (Boag) increased his demand from \$5,000 to \$25,000 after Young's representative made him that offer.

"Q. Did Mr. Boag assign any reason for the increase in his price for his stock?

A. Yes, he did.

Q. Will you state what that reason was?

A. Mr. Boag said that Mr. Purcell (Young's lawyer) had offered him \$25,000 for his stock * * * and that his services were well worth \$25,000 if not more * * *." (34.)

Not only did Petitioner Young offer to meet *any* offer that Potts and Boag should get from Bradley and Murphy, and personally offered Boag \$25,000 for Boag's 10 shares of stock, but he also suggested to Potts a membership on the Board of Directors of The Higbee Company (47) and suggested also that Potts might file an application for compensation with the Court in the reorganization proceeding, which would probably be allowed. (47.)

One of the principal contentions in the S. E. C. brief is made in the following language:

"3. The status of Potts and Boag as members of a protective committee precluded them from appealing solely on their own behalf. * * * We now state our reasons for agreeing with Petitioner that these past connections are sufficient in themselves to charge Potts and Boag with fiduciary responsibilities to other stockholders of the debtor.

"Potts and Boag had initially voiced objections to the junior debt claim while acting in a representative capacity as members of a protective committee for the preferred stockholders. As this Court has held, protective committee members are fiduciaries bound to give loyalty and disinterested service in the interest

of those for whom they purport to act. * * * Having voluntarily assumed this status, Potts and Boag could not shuffle off their fiduciary responsibilities merely by resigning from the committee and proceeding in their own names." (S. E. C. Brief, 17-19.)

The basic fallacy underlying this argument (as we see it) is its erroneous assumption of facts.

We have no doubt that *if* the facts were as the S. E. C. brief seeks to make them, there would be some force in their contentions.

We concede that if a member of a protective committee should secretly resign from a committee, thereby misleading the persons represented by the committee, and then profit out of the situation so created, he might fairly be called to account.

But despite the assumptions of S. E. C., those simply are not the facts in our case at bar.

There was no secret about the fact that Potts and Boag had resigned from their former committee. This was not done in a corner or in a closet. It was done noisily and with publicity.

Thereafter, Potts and Boag *tried* to organize a new committee, and circulated the stockholders, *trying* to get support for their continued opposition.

This attempt was wholly unsuccessful. The third member who had authorized them to use his name in this attempt (John W. Joughin) withdrew. (186.)

Not a single one of the preferred stockholders joined with Potts and Boag. (Special Finding No. 10, p. 241.)

It is, therefore, unwarranted to *assume* that other preferred stockholders were misled, and that for this reason Potts and Boag continued to have fiduciary obligations towards the other preferred stockholders.

**The Case of Sprague v. Ticonic National Bank,
307 U. S. 161.**

The brief of S. E. C. attaches great importance to the *Sprague* case, *supra*, and argues that inasmuch as the appellant in that case was given *rights* against other members of a class because of her efforts and her successful appeal, that it must necessarily follow as a matter of logic that there were what the brief calls "*concomitant responsibilities*" which also attach to an individual appeal.

We submit that the logic of the *Sprague* case does not compel any such conclusion or any such results.

Just what are the "concomitant responsibilities" of an individual appeal?

As we have suggested above, this concept of "concomitant responsibilities" takes us into the field of legislation rather than judicial interpretation.

Should these "concomitant responsibilities" embrace the duty of continued prosecution?

Should they embrace the duty of *diligent* prosecution, in contradistinction to lackadaisical prosecution?

Could an appellant be charged with negligence, or his lawyers with malpractice, for incompetent or negligent conduct of the appeal?

So long as Congress has given the individual stockholder the *right* to file and prosecute his own individual appeal, we should think that it was inherent in that *right* to prosecute it or discontinue it on his own terms.

II. IT IS INEQUITABLE AND CONTRARY TO THE AIMS OF BANKRUPTCY REORGANIZATION TO PERMIT POTTS AND BOAG TO RETAIN THE FRUITS OF THEIR SALE OF THE APPEAL.

In support of this proposition the S. E. C. brief argues that the dismissal of the Potts-Boag appeal inequitably and improperly prevented a hearing of the appeal in the Circuit Court of Appeals, and thereby the other preferred stockholders were wronged.

The fallacy underlying this argument is the same which pervades the rest of the S. E. C. brief, to wit: that there were other preferred stockholders who desired the appeal to be heard.

This is the basic assumption, or major premise, of the entire S. E. C. brief.

But where is there anything in the Findings, or in the evidence, to support it?

On the contrary, it is clear that there were *not* any other such preferred stockholders who desired the appeal heard.

On this point the S. E. C. brief says:

“Through the device of selling their securities, they prevented the appeal which they had taken on the ground that the plan was unfair, from ever reaching a hearing by an appellate Court.” (S. E. C. Brief, p. 22.)

This argument (we should think) comes with singularly bad grace from the S. E. C., which sent a telegram to the Circuit Court of Appeals when the dismissal was under consideration, in which it said that it had:

“* * * No objection to dismissal of appeal, however, since we consider plan fair and feasible.” (79.)

If—despite all of the facts of the sale by Potts and Boag to Bradley and Murphy which were then known—the S. E. C. still thought it appropriate and proper to dismiss the appeal, it could well be argued that it was quite as much the action of the S. E. C. which caused the dismissal of the appeal as the acts of Potts and Boag.

III. POTTS AND BOAG SHOULD BE DIRECTED TO PAY OVER TO THE DEBTOR THE CONSIDERATION THEY RECEIVED FOR SELLING THE APPEAL.

In support of this contention, the brief of S. E. C. discusses the question of *res judicata* as follows:

"Such relief is not barred by the orders of the Circuit Court of Appeals denying Young's application to intervene and dismissing the appeal. Although Young's earlier application, like the application under consideration here, was predicated on the ground that respondents were prosecuting their appeal as representatives of the preferred stockholders, there exists no basis for *res judicata*.

"In opposition to Young's application to intervene and continue the appeal, it was properly urged that he had failed to object to the confirmation of the plan and that he had ulterior motives. Certainly in determining whether to permit Young to continue the appeal, *the Court was entitled to find that his failure to object to the plan in the lower Court estopped him from contesting its inequity at the appellate level.*

"Effective appellate administration and proper functioning of reorganization machinery both require an appellate court, in the absence of strong counter-vailing equities to refuse to hear objections to a plan which are offered by a person who failed to urge them in the reorganization court." (S. E. C. Brief, 32, 33.)

If the brief of S. E. C. is correct in the foregoing statement, it would seem to dispose at once of all of its contentions in its brief.

That is true because *all* of the other preferred stockholders are in the same boat with Young. Not a single one of them objected to the amended plan of reorganization—and as already pointed out in this brief, the District Court made it clear and emphatic (252, 221) that the plan was acceptable to *all* of the preferred stockholders except only Potts and Boag.

If the S. E. C. brief is right when it concedes that Petitioner Young had no right to object to dismissal, all of the others would appear to have been in the same situation exactly.

We have not taken the position that the judgment of dismissal in the Circuit Court of Appeals was—strictly speaking—a case of *res judicata*.

It is more accurately a case of collateral estoppel by judgment.

If in a case between plaintiff and defendant, two issues are involved, to wit: (A) and (B), and there is a general finding for the defendant, it follows of necessity that the plaintiff has failed on one or the other or both of these two issues; and by equal logic, it follows that the defendant has won on one or the other or both of these issues.

If in a subsequent litigation the plaintiff is in a situation where he is required to establish only one of these two issues, (A) or (B), there can be no successful collateral estoppel by judgment because of the inability to prove on which issue the defendant formerly prevailed.

But if in such subsequent litigation, it is necessary for the plaintiff to prevail on *both* issues, (A) and (B), then by equal logic the defendant must win because it is demonstrable that he has already won on at least one of the two issues with respect to *both* of which in the subsequent litigation the plaintiff must prevail if he is to win at all.

Applying that analysis to our case at bar, we have this situation: at the time the Potts-Boag appeal was dismissed, the same facts which are now in the record were before that Court.

Then, as now, it was claimed that Potts and Boag prosecuted their appeal in a representative and fiduciary capacity.

Then, as now, Potts and Boag insisted that their appeal was made in an individual capacity.

With all the facts before it the Circuit Court of Appeals held that Potts and Boag had the right to dismiss their appeal; and this judgment in turn involved the determination that (A) they had that as an unqualified right,

irrespective of any profits to them in the transaction; *or* (B) that the facts of the transaction (which are the same facts shown in this record) were not such as to establish any wrong or prejudice to the corporation or to its preferred stockholders or at any rate, to those Preferred Stockholders who had any right to complain.

In the proceeding which is now before this Court, we submit that the Petitioner can not prevail without proving *both* (A) and (B), towit, that (A) Potts and Boag did *not* have the unqualified right to dismiss their appeal; and (B) that the facts of the transaction were such as established prejudice to the corporation or to some of its Preferred Stockholders.

Inasmuch as in the former proceeding before the Circuit Court of Appeals, there was a direct adjudication against the Petitioner which of necessity was based *either* on (A) or on (B), he can not prevail now when he is required to prove both of them, to win.

IN CONCLUSION.

For the reasons presented in the foregoing Brief, and in our Original Brief filed in answer to Petitioner's Brief, we submit that the judgments of the lower courts should be affirmed.

Respectfully submitted,

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SEP 14 1944

CHAS. B. BOWEN & CO. ST. LOUIS, MO.

No. 342

In the Supreme Court of the United States

OCTOBER TERM, 1944

ROBERT R. YOUNG, PETITIONER

v.

THE HIGBEE COMPANY, WILLIAM W. BOAG, AND
J. F. POTTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH
CIRCUIT

MEMORANDUM FOR THE SECURITIES AND EXCHANGE
COMMISSION

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INTRODUCTORY STATEMENT

The Securities and Exchange Commission became a party in the District Court to the present proceeding for the reorganization of The Higbee Company under Chapter X of the Bankruptcy Act.¹ The Commission took no position in the District Court on the questions involved in the present appeal, nor did it participate in the appeal

¹ The Commission became a party pursuant to the provisions of Section 208 of the Bankruptcy Act (11 U. S. C., Section 608).

to the Circuit Court of Appeals. It is the Commission's view, however, that the decision of the Circuit Court of Appeals raises an issue of public importance in the administration of Chapter X of the Bankruptcy Act and, by analogy, in the administration of the reorganization provisions of the Public Utility Holding Company Act of 1935, which should be settled by this Court.

If the Commission is not properly to be regarded as a party respondent, in view of its non-participation on the appeal below, we ask the Court to regard this memorandum as a memorandum for the Commission *amicus curiae* in support of the petition.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals is reported at 142 F. (2d) 1004. The opinion of the district court (R. 252-255) is not reported.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on May 15, 1944. The petition for a writ of certiorari was filed on August 14, 1944. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether certain stockholders of a company in reorganization are accountable for sums received by them as consideration for the abandonment of

an appeal taken in the proceedings, where the appeal, if successful, would have benefited an entire class.

STATUTE INVOLVED

The petition for a writ of certiorari does not involve the construction of any specific provision of Chapter X of the Bankruptcy Act.

STATEMENT

A plan of reorganization for The Higbee Company in proceedings under Chapter X of the Bankruptcy Act was confirmed by order of the United States District Court for the Northern District of Ohio, Eastern Division, on October 17, 1941. The Securities and Exchange Commission, pursuant to Section 172 of Chapter X, had previously examined the plan and issued its advisory report finding the plan to be fair and feasible. An appeal was taken from the confirmation order by two first preferred stockholders of the debtor corporation, Potts and Boag (R. 181-182). The essence of their appeal was that the plan awarded too great a participation in the reorganized company to creditors' claims held by Bradley and Murphy, officers and directors of the debtor (R. 182-84).

On March 7, 1942, after the expiration of the time for appeal from the confirmation order, Potts and Boag sold their stock to Bradley and Murphy for a total consideration of \$115,000 (R. 188-190).

On March 11, 1942, on stipulation of counsel the appeal was dismissed. The par value of the Potts and Boag holdings was \$26,000 and at the time of the sale the market value was substantially less. (R. 188.) The difference between the price paid and the value of the stock was admittedly given as consideration for "selling the appeal" (R. 188).

The instant proceeding was instituted by another first preferred stockholder, Young, who applied to the bankruptcy court for an order either (a) authorizing him to employ counsel to institute proceedings on behalf of the debtor against Potts and Boag for an accounting and payment to the debtor of a sum equal to the difference between the fair value of the stock sold by Potts and Boag and the amount they received, or (b) directing Potts and Boag to pay over this sum to the first preferred stockholders of the debtor² (R. 2-4.) This application was denied by the District Court, and the Circuit Court of Appeals affirmed.

ARGUMENT

1. The court below impliedly conceded that had Potts and Boag taken their appeal in a representative capacity and not as individuals, it would have been inequitable not to share with other stockholders the consideration they received for abandoning the appeal. It is our position that in the

² The original application sought relief also against Bradley and Murphy but petitioner has not made them parties in his petition to this Court.

context of this reorganization proceeding the intention of Potts and Boag to sue as individuals was immaterial and that their duty to account flowed from the very nature of the appeal which they had "sold." If Potts and Boag had prosecuted their appeal to a successful conclusion there would have resulted a reduction of the amount of debt outstanding, and that would necessarily have accorded a more favorable participation for all stockholders who shared in the reorganized corporation. Whether or not they wished to act in their individual capacities, Potts and Boag could not attempt to improve their position in the reorganization except by improving the position of the other stockholders. Indeed, had they successfully prosecuted the appeal, they would have been entitled to allowances because their appeal benefited an entire class. *In re Keystone Realty Holding Co.*, 117 F. (2d) 1003, 1006 (C. C. A. 3, 1941). Furthermore, the taking by an individual stockholder of an appeal from an order approving a plan of reorganization necessarily subjects the entire class to the disadvantage of delaying consummation of a plan which other members may be prepared to accept. Thus, whether successful or unsuccessful, the individual security holder's appeal necessarily affects the entire class. Accordingly the appeal in this case, no matter how it may have been designated, was inherently an appeal on behalf of all other stockholders.

The Circuit Court of Appeals erroneously regarded it as of significance that the appeal pur-

ported to be one brought solely on behalf of Potts and Boag in their individual capacity.³ In so holding we believe that the court below adopted an unduly narrow view of the nature of an appeal from an order confirming a plan of reorganization, as well as of the duties of a reorganization court as a court of equity to protect the integrity of the reorganization processes. As an illustration of the inherently representative character of such an appeal, irrespective of its label, we refer to the decision of this Court in *Sprague v. Ticonic National Bank*, 307 U. S. 161. That case involved a claim for counsel fees and litigation expenses on behalf of a depositor of a closed bank who had established her right to priority of her own deposit by a suit prosecuted in her individual behalf. By reason of *stare decisis* the litigation of her individual claim established the rights of an entire class of depositors similarly situated. In holding that the

³ Petitioner Young also contends that the courts below erred in concluding that Potts and Boag were assuming to take their appeal only in their individual capacities. We are inclined to agree that their past connection with a protective committee should in itself preclude them from retaining for themselves the benefits from the sale of their securities and that they should not have been permitted to shuffle off expressly assumed fiduciary responsibilities merely because it happened to suit their purpose. Cf. *In re Reynolds Investing Co., Inc.*, 130 F. (2d) 60 (C. C. A. 3, 1942). Our memorandum, however, rests on what we conceive to be the inherent character of their appeal, and we do not here consider the equitable consequences of their attempted transformation from representatives to individual litigants.

individual nature of the suit did not bar her from receiving compensation from the fund payable to all other depositors similarly situated, this Court stated (at pp. 166-167):

That the party in a situation like the present neither purported to sue for a class nor formally established by litigation a fund available to the class, does not seem to be a differentiating factor so far as it affects the source of the recognized power of equity to grant reimbursements of the kind for which the petitioner in this case appealed to the chancellor's discretion.

* * * Whether one professes to sue representatively or formally makes a fund available for others may, of course, be a relevant circumstance in making the fund liable for his costs in producing it. But when such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation—the absence of an avowed class suit or the creation of a fund, as it were, through *stare decisis* rather than through a decree—hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation.

While the *Sprague* case determined the rights of an individual plaintiff against the beneficiaries of her action it seems clear that the inherently representative character of the action imposes equivalent obligation upon one into whose hands a fund has come. Consequently, whether the fund

has been obtained by suit or settlement such a person is under an obligation to account for that fund to the other members of the class who are beneficiaries of his litigation.

In selling their stock for the admitted purpose of selling the appeal Potts and Boag were in effect compromising the interests of all the debtor's stockholders. They realized much more than the improved position which they sought for themselves in the reorganized corporation and the compromise was therefore not merely of the gains which they sought for themselves but was necessarily a compromise of the gains which every stockholder participating in the reorganization would have received from a successful appeal. To permit Potts and Boag to retain the fruits of the compromise would not only violate the fundamental principle which calls for equal treatment of all security holders of the same class, but would permit them to profit extortionately from their abuse of the appellate process.

The refusal of a reorganization court to permit the unjust enrichment of individuals seeking a price for their consent to participate in a plan will not handicap the proper compromise of appeals from orders confirming reorganization plans but will merely require that the consideration received for the dismissal of such appeals must benefit all who would have benefited had an appeal been successful. Incentive to appeal will not be

eliminated since, as we have pointed out, those prosecuting such appeals are undoubtedly entitled to an allowance which reflects the extent to which the appeal benefits the estate or the class of investors affected.

2. Respondents made certain contentions in the court below not mentioned by the court in its decision. It is our view that these are without merit.

(a) It was contended below that Young should not succeed in his application because he, like other stockholders, did not object to the plan of reorganization which was confirmed. However, the acceptance by Young and the other stockholders of the plan of reorganization which was confirmed could not have affected their rights in any way had the appeal been successful and there is no reason why a different principle should be applicable to a compromise of that appeal.

(b) Respondent also pointed out in the court below that the purchase of the shares held by Potts and Boag was made because certain actions of Young had forced Bradley and Murphy to procure the abandonment of the appeal in order to retain their interest in The Higbee Company. We do not believe that either the motivating reasons for the sale of the securities or possible improprieties on the part of Young have any bearing on this application which seeks relief for the debtor or all of its first preferred stockholders. If Young was not a proper person to prosecute an

accounting suit for the estate or for the stockholders, the bankruptcy court could have ordered the trustee or some other satisfactory representative to do so. So long as the facts were properly before the court it was under a duty to require Potts and Boag to share the proceeds of the settlement of the appeal with those who would have benefited had the appeal been successful. In such a case the obligation is one which does not rest on the identity of the moving party; indeed the court was free to act on its own motion.

(c) It was also pointed out below that Young had been denied leave by the Circuit Court of Appeals to intervene in the appeal by Potts and Boag and to continue it at his own expense, and it was contended that the questions raised on the present application have thus already been adversely determined against Young. In connection with its order denying Young's application to intervene, the Circuit Court of Appeals gave no reasons for its action. Nor did that court in the instant appeal refer to its former order. We submit that the issues presented were not the same. On the prior appeal the court may have considered that Young was not a proper party to prosecute it, or it may have believed that the consideration paid was a reasonable amount for settlement of the controversy, without considering who the beneficiaries of the settlement should be.

3. The public importance of the question involved is derived from the very liberal provisions for security holder participation and appeal under

modern reorganization statutes.⁴ Under the equity receivership procedure security holders' participation in the proceeding was dependent upon the discretion of the court in allowing intervention while dissenters' attacks on reorganization plans were based principally on a theory of fraudulent conveyance which permitted an unfairly treated creditor to exercise an individual, not a class, right to disregard the plan and to attach the debtor's assets in the hands of the reorganized corporation—or to reach assets otherwise inequitably diverted to stock-

⁴ See *e. g.*, Sections 169, 174, 179, and 206 of Chapter X (11 U. S. C., Sections 569, 574, 579, and 606), giving to any interested security holder a standing to be heard as of right upon the question of approval or confirmation of a plan. This statutory right to be heard has been interpreted as carrying with it a standing to appeal irrespective of whether formal intervention is permitted. See *In re Day & Meyer, Murray & Young, Inc.*, 93 F. (2d) 657 (C. C. A. 2, 1938); *In re Keystone Realty Holding Co.*, 117 F. (2d) 1003 (C. C. A. 3, 1941); and *Dana v. S. E. C.*, 125 F. (2d) 542 (C. C. A. 2, 1942).

See also Section 24 (a) of the Public Utility Holding Company Act of 1935 (15 U. S. C., Section 79x (a)), permitting a petition for review of a Commission order by any person or party aggrieved. Where plans of reorganization approved by the Commission under that Act are subject to approval by a District Court of the United States, the statute expressly provides for "notice and opportunity for hearing" (Section 11 (e), 15 U. S. C., 79k (e)). We believe that this authorizes participation by interested investors and carries with it rights of appeal from a district court order approving a plan comparable to those provided in Chapter X. *Otis & Co. v. S. E. C.*, certiorari granted, No. 81, present Term, involves such an appeal, although the record is open to the interpretation that Otis & Co. was accorded by the district court the status of an intervener.

holders.⁵ By contrast to the equity practice limiting investor participation to discretionary intervention, the modern reorganization statutes permit any security holder to be heard on the fairness of the plan and to appeal. As we have stated above, it is our position on the merits that these liberalized provisions for investor participation must be interpreted as carrying with them concomitant responsibilities.

⁵ Instances of such methods of attack on unfair plans are *Chicago, Rock Island & Pacific R. R. Co. v. Howard*, 7 Wall. 392 (1868); *Louisville Trust Co. v. Louisville & C. Ry.*, 174 U. S. 674, 684 (1899); *Northern Pacific Ry. Co. v. Boyd*, 228 U. S. 482 (1913). As recently as the *National Radiator Co.* case, *First National Bank of Cincinnati v. Flershem*, 290 U. S. 504, 521 (1934), where this Court reversed the action of the courts below in holding that a court of equity had jurisdiction to appoint a receiver and provide for a receivership sale to reorganize a solvent corporation, it was indicated that the effect of the successful challenge to the plan was limited to such of the appellants as had objected to the lack of equity jurisdiction, but would not affect the status of approximately 95% of the holders of securities of the same class which had been deposited in support of the reorganization plan. The Court said:

"* * * The debenture holders who, by assenting to the Plan, cooperated with the Corporation and the Reorganization Committee, are in no position to complain that these petitioners will fare better than they. Compare *Davis v. Virginia Ry. & Power Co.*, 229 Fed. 633, 642 [C. C. A. 4]. Since the assets fraudulently conveyed far exceed the amount of the claims of all non-assenting creditors, none of these could have occasion to object to the payment to these petitioners in full "

Our position that any appeal challenging the fairness of a reorganization plan under Chapter X and similar statutes is necessarily a class appeal is based on the fact that the modern practice provides for direct rather than collateral attack on the order approving or confirming a plan.

The decision of the court below will tend to thwart one of the major objectives of bankruptcy reorganizations—the fair and equitable treatment of all who are entitled to participate in the estate. In addition, the decision will have the effect of encouraging participants in reorganization proceedings to object to reorganization plans and to prosecute appeals therefrom even where they have no basis for believing that such objections are sound, in the hope of exacting from other interested participants something more than the amount received by fellow members of their class. Thereby the same evils which Rule 23 (c) of the Rules of Civil Procedure guards against in other types of representative or derivative litigation^{*} will become fastened upon reorganization procedure in situations like this where the application of the safeguards of that Rule may be doubtful. The just and expeditious reorganization of estates will consequently be impeded to the detriment of those on whose behalf the statute was enacted. These evils would not necessarily be confined to bankruptcy reorganizations. The experience of the Commission in administering the Public Utility Holding Company Act of 1935 has indicated that similar problems arise in connection with reorganizations under Section 11 of that statute.

^{*} Cf. Hornstein, *Problems of Procedure in Stockholder's Derivative Suits* (1942), 42 Col. L. Rev. 574, 583, *et seq.*; and Hornstein, *Legal Controls for Intracorporate Abuse—Present and Future* (1941), 41 Col. L. Rev. 405, 425-29.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be granted.

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SEPTEMBER 1944.

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OCTOBER TERM, 1944

ROBERT R. YOUNG, PETITIONER

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J. F. POTTS**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SIXTH CIRCUIT**

**BRIEF FOR THE SECURITIES AND EXCHANGE
COMMISSION**

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v.

THE HIGBEE COMPANY, WILLIAM W. BOAG, AND
J. F. POTTS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION

Pursuant to Section 208 of the Bankruptcy Act (11 U. S. C. § 608), the Securities and Exchange Commission became a party in the district court to the present proceeding for the reorganization of The Higbee Company. The Commission took no position in the district court on the questions involved in the present appeal, nor did it participate in the appeal to the Circuit Court of Appeals. The Commission is not named as a respondent herein.

If the Commission is not properly to be regarded as a party respondent, in view of its non-

participation on the appeal below, we ask the Court to regard this brief as a brief for the Commission *amicus curiae* in support of the petitioner.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals is reported at 142 F. (2d) 1004. The opinion of the district court (R. 252-255) is not reported.

JURISDICTION

The decree of the Circuit Court of Appeals was entered on May 15, 1944. The petition for a writ of certiorari was filed on August 14, 1944 and granted October 9, 1944. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether certain stockholders of a company in reorganization under the Bankruptcy Act are accountable for sums received by them as consideration for the abandonment of an appeal taken in the proceedings, where the appeal, if successful, would have benefited an entire class.

STATUTE INVOLVED

The question arises under Chapter X of the Bankruptcy Act but does not turn on the express language of any provision thereof.

STATEMENT

The reorganization of the debtor, a Delaware corporation which operates a general department

store in the City of Cleveland, was instituted in 1935, by the filing of a voluntary petition under Section 77B of the Bankruptcy Act in the United States District Court for the Northern District of Ohio (R. 74, 82, 221). No trustee was appointed and the debtor was permitted to remain in possession and operation of the business subject to the jurisdiction of the court. On September 22, 1938, Chapter X became effective and on January 23, 1940, the Commission became a party to this reorganization.

The Plan of Reorganization

A plan of reorganization which had been submitted by the management was confirmed by order of the district court on October 17, 1941 (R. 181). The Securities and Exchange Commission, pursuant to Section 172 of the Bankruptcy Act, had previously examined the plan and issued its advisory report finding the plan to be fair and feasible. *In the Matter of The Higbee Company*, 8 S. E. C. 777. The Commission found that the assets of the debtor were worth between \$6,100,000 and \$6,300,000. The plan provided participation for the senior and junior indebtedness, and for the first and second preferred stocks. The common stock, all of which was owned by the holders of the junior debt, was accorded no participation in the reorganized enterprise.

The Appeal from the Confirmation Order

Contending that the plan awarded too great a participation in the reorganized company to the junior debt claim of \$1,952,000, two first preferred stockholders of the debtor corporation, Potts and Boag, appealed from the confirmation order (R. 181-84, 8 S. E. C. 779). The disputed claim, together with the common stock, had been acquired in 1937 by Bradley and Murphy, directors of the debtor (R. 109, 113, 114).¹ Under the plan the junior debt claim was to receive \$600,000 in new notes and a majority of the new common stock. Potts and Boag contended that the claim should have been subordinated to the first and second preferred stocks or in the alternative should have been allowed only in a smaller amount (R. 182-84).

Potts and Boag had earlier been members of a stockholders' committee which had contended that the junior debt claim was invalid (R. 81-87, 100). Subsequently, they had resigned from the committee in protest over the action of its counsel in approving the plan (R. 147). For a time thereafter, holding themselves out as a new committee, Potts and Boag claimed to represent other stock-

¹ Bradley was a director and officer of the debtor at the time of the purchase (R. 109). He continued to be a director during the pendency of the appeal by Potts and Boag from the confirmation order and was also president of the debtor (R. 114, 117). During this period Murphy was also a director of the debtor (R. 117).

holders, and sought to induce other stockholders to join with them (R. 172-78, 185-87). For the purpose of this brief we assume that the court below was correct in holding that Potts and Boag, as a committee, never received specific authority from other stockholders.² Their appeal from the confirmation order was taken in their own names only (R. 181-82).

On March 7, 1942, after the expiration of the time within which any other security holders might have appealed from the confirmation order, Potts and Boag sold their stock (260 shares) to Bradley and Murphy, pursuant to a contract whereby they agreed to the dismissal of the appeal (R. 188-90, 223). The sale price was \$115,000, although the par value of the Potts and Boag holdings was \$26,000 and at that time the market value was about \$17,000 (R. 188, 221). The difference between the price paid and the value of the stock was admittedly received as consideration for "selling the appeal" (R. 188). Thereafter, upon stipulation of counsel, the parties sought to dismiss the appeal (R. 55, 72).

At the time the appeal of Potts and Boag was sought to be dismissed, Young, the petitioner herein, who was a holder of 138 shares of the debtor's first preferred stock, petitioned to inter-

² As we hereafter argue, *infra*, pp. 17-21, we attach no significance to this finding insofar as it affects the fiduciary obligation of Potts and Boag as members of a protective committee.

vene and to continue the appeal at his own expense (R. 67-72, 80). The parties objected to Young's intervention on the grounds, *inter alia*, that he had not objected to the plan in the bankruptcy court (R. 55, 60) and that he had "ulterior purposes" (R. 55)—apparently referring to his attempts to secure control of the debtor, which allegedly motivated Bradley and Murphy in purchasing the appeal (R. 29, 49-50, 73-79, 230-231).⁵ This application was denied without opinion by the circuit court of appeals on March 11, 1942, and on the same date it dismissed the appeal (R. 72-73).

The Present Application

The instant proceeding was instituted by Young, who applied to the bankruptcy court for an order either (a) authorizing him to employ counsel to institute proceedings on behalf of the debtor against Potts and Boag for an accounting and payment to the debtor of a sum equal to the difference between the fair value of the stock sold by Potts and Boag and the amount they received, or (b) directing Potts and Boag to pay over this sum to the first-preferred stockholders of the

⁵ *Cf.* facts set forth in *In re Higbee Company*, 50 F. Supp. 114 (D. Ohio 43), affirmed *sub nom* *Young v. Bradley*, 142 F. (2d) 658 (C. C. A. 6, 1944), certiorari denied No. 496, November 13, 1944.

debtor⁴ (R. 2-4). This application was denied by the district court, and the circuit court of appeals affirmed.

SUMMARY OF ARGUMENT

Since the reorganization plan challenged on appeal by Potts and Boag could not have been held unfair to them without being held unfair to all other participating stockholders of the debtor, the appeal was essentially representative—and this is no less so because the appeal was not designated as a class suit. Moreover, the former connections of Potts and Boag with a stockholders' protective committee precluded them, under the circumstances of this case, from taking their appeal solely on their own behalf.

By retaining for themselves the consideration they received for abandoning their appeal, Potts and Boag effected a result contrary to the aim of the bankruptcy reorganization statutes that security holders of the same class should receive equal treatment in the reorganization proceeding, and they thereby violated responsibilities inherent in their representative capacity. The bankruptcy court, as a court of equity, has the power and duty to correct this inequitable result. The appropriate relief is to compel Potts and Boag to pay over to the debtor the consideration they received for selling the appeal.

⁴The original application sought relief also against Bradley and Murphy but petitioner has not made them parties in his petition to this Court.

ARGUMENT

I

THE APPEAL BY POTTS AND BOAG WAS ESSENTIALLY REPRESENTATIVE IN CHARACTER AND SUBJECTED THEM TO CONTROL OF THE REORGANIZATION COURT

1. As a result of their appeal from the order confirming the plan of reorganization, Potts and Boag received from Bradley and Murphy \$115,000 for securities of a par value of \$26,000 and a market value of approximately \$17,000. Their appeal challenged the fairness of the reorganization plan in providing for \$600,000 of new debt to compensate the disputed debt claim of Bradley and Murphy. Had the appeal been successful and the order confirming the plan reversed, no new plan could have been confirmed unless it eliminated or reduced the amount of debt securities to be issued for the Bradley and Murphy claim.⁵ This would have improved the position of all public stockholders entitled to share in the reorganized corporation. Except for such compensation as the bankruptcy court might have awarded Potts and Boag for effecting this result, they would not have benefited to any greater degree than other preferred stockholders.

It is our position that whether or not the appeal was fought to a successful conclusion Potts and

⁵ Since Bradley and Murphy held all of the old common stock, it is immaterial whether their debt would have been subordinated or disallowed.

Boag were not entitled to secure greater benefits from it than other security holders in the same class except to the extent that they might be awarded compensation by the bankruptcy court. We contend that in undertaking this appeal, bottomed upon class rights of participants in a bankruptcy reorganization, Potts and Boag assumed a status different from that of a party in individual litigation and undertook responsibilities which they subsequently violated in retaining for themselves the consideration they received for abandoning the appeal.

Persons suing on behalf of a class do not have unrestricted control over their litigation. Having undertaken to represent others, they are subjected to a degree of court control to protect other members of the class.⁶ Thus, the courts have long since permitted intervention by other members of a class, especially when it appeared that those instituting the action might not adequately represent them,⁷ and courts have refused to permit dismissal of class litigation on terms unfair to those on whose behalf the action was

⁶ Cf. *Whitten v. Dabney*, 171 Cal. 621, 625, 621-2, 154 Pac. 312, 315, 316-17 (1915); and see cases cited in footnotes 7 and 8, *infra*.

⁷ *Southern Pacific Co. v. Bogert*, 250 U. S. 483, 498 (1919); and *United States Lines, Inc. v. United States Lines Co.*, 96 F. (2d) 148 (C. C. A. 2, 1938); and cf. *Golconda Petroleum Corp. v. Petrol Corp.*, 46 F. Supp. 23 (S. D. Cal. 1942); *Bowker v. Haight & Freese Co.*, 140 Fed. 794 (S. D. N. Y., 1905). See also Rule 24 of the Rules of Civil Procedure.

brought." Similarly, dismissal and compromise of a class suit under Rule 23 of the Rules of Civil Procedure are expressly required to be with the approval of the court. As the court noted in *Cohen v. Young*, 127 F. (2d) 721, 725 (C. C. A. 6), in considering the application of Rule 23 to a stockholder's representative action, "the rule was adopted to secure not routine approval of a consent decree, but in order to insure supervision of the court for the protection of the corporation and all the stockholders." Thus, under Rule 23 the court may require that notice be given to all other members of the class and, where the right sought to be enforced is joint, or common, or derivative, such notice is mandatory.

The necessity for these requirements is indicated by evils which have resulted in cases where the courts have not assumed to exercise such controls. There have been numerous instances where

* *Whitten v. Dabney*, *supra*, note 6; *United States Lines, Inc. v. United States Lines Co.*, *supra*, note 7; *Naspo v. Sunn-
mit Sweets Shoppe*, 106 N. J. Eq. 49, 150 Atl. 199 (1930); *Atlas Bank v. Nahant Bank*, 23 Pick. 480, 491 (Mass.) (1840); *Honesdale Shoe Co. v. Montgomery*, 56 W. Va. 397, 49 S. E. 434 (1904); *McLaughlin, Capacity of Plaintiff-
Stockholder to Terminate a Stockholder's Suit* (1937) 46 Yale L. J. 421, 433-35. Cf. *Denicke v. Anglo California National Bank*, 141 F. (2d) 285 (C. C. A. 9, 1944) where the court directed dismissal of a class action under Rule 23 (c), over the objection of the complainant stockholder, when it appeared that a new management had taken control of the corporation and had effected a compromise of the litigation on terms which the court found fair.

inequity resulted from representative suits, especially stockholders' derivative actions, because the self-appointed representatives succeeded in achieving personal benefits at the expense of those purported to be represented.⁹ In *Winkelman v. General Motors Corp.*, 48 F. Supp. 504, 514 (S. D. N. Y.) the court pointed out: "A question of public policy had developed in actions of this type, due to the private and secret settlement of stockholders' suits, made without court review and without notice to other stockholders. Against that unsavory practice the corrective provisions of Rule 23 (c) were directed." Unsupervised settlements with these tendencies toward "unsavory practices" have sometimes been achieved through the device of purchasing the complainants' securities.¹⁰

⁹ *Securities and Exchange Commission Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committee* (1937), Pt. 1, 691-704; Hornstein, *Problems of Procedure in Stockholders' Derivative Suits* (1942) 42 Col. L. Rev. 574, 583-84.

¹⁰ The recent decision of the Third Circuit in *Webster Eisenlohr, Inc. v. Kalodner*, 145 F. (2d) 316, illustrates the evils which may flow from the private purchase of the complaining stockholder's shares as a mode of "settling" litigation of a representative character without the judicial supervision which would be obtained in a direct compromise of the suit under Rule 23 (c). There the district court discovered, after the event, that the defendants had not only purchased the complaining stockholder's shares but had also purchased a substantial part of the outstanding shares of the

The foregoing authorities, of course, are relied on here only as illustrative of the principle that a

complaining class on the basis of representations and financial statements of a misleading character. The court thereupon sought to inquire into the bona fides of this "settlement" under its power and duty to pass upon a compromise of such litigation under Rule 23 (c) and appointed a special master to conduct an investigation. Upon petition for writs of mandamus and prohibition a majority of the Third Circuit (sitting *in banc*) held that the district court had exceeded its power in undertaking this inquiry because it went beyond the issues presented in the litigation and did not deal with a "compromise" of the claims as the court defined that term, and the action was still pending subject to court approval of a motion for its dismissal. The minority, consisting of Biggs and McLaughlin, J. J., considered that the investigation, while unduly broad in scope, was, in respects material here, within the issues. The minority urged that the purchases of the stock were tantamount to a compromise of the litigation, making the case "ripe for dismissal," which could not be accomplished without court approval under Rule 23 (c). Since, however, it appeared that by the time of the oral argument in the circuit court of appeals, the defendants had redeemed all the remaining shares, it may be doubted whether the district court's investigation could have resulted in further prosecution of the litigation and accordingly the defendants were actually successful in accomplishing their purpose of frustrating the suit.

See also, *Manufacturers Mutual Fire Insurance Co. v. Hopson*, 176 Misc. 220, 25 N. Y. S. (2d) 502 (N. Y. Sup. Ct. 1940), *aff'd*, 262 App. Div. 731, 29 N. Y. S. (2d) 139 (1941), *aff'd*, 288 N. Y. 668, 43 N. E. (2d) 71 (1942), where the complainant's securities were purchased at a price greatly in excess of the market, the pleadings were withdrawn from the court files, and a stockholder who later discovered this suit and its "settlement" attempted to carry on the litigation but was apparently barred from so doing by the running of the statute of limitations.

class cause of action does not become the individual asset of the person instituting it, and that accordingly, any effort to dismiss or compromise it requires the exercise of the court's equitable jurisdiction to protect members of the class affected. We do not regard the practice of giving notice and opportunity to intervene to members of the class in the event of a proposal to dismiss or compromise as exhausting the equity jurisdiction of the court in which the suit is pending. At a later point we discuss the problem of appropriate equitable relief under the circumstances of the present case (see Point III, *infra*).

The appeal by Potts and Boag was as inherently representative as a stockholder's derivative suit. Defenses to the claim of Bradley and Murphy were primarily available to the debtor corporation, and Potts and Boag were in effect seeking to enforce a secondary right available to the stockholders upon the failure of any other representative of the corporation to act. Just as recovery in a stockholder's derivative action goes to the corporation, and the benefit to individual stockholders results only from the increased value of their equity, so here Potts and Boag could have recovered no monetary judgment for themselves by winning the appeal. Instead, like all other stockholders participating in the reorganization, they would have benefited indirectly through the improved debt position of the debtor corporation.

The representative character of their appeal is also illustrated by its similarity to appeals in an ordinary bankruptcy proceeding by one creditor from an order allowing the claim of another creditor. The courts have generally held that such appeals must be brought by the trustee as the representative of all the creditors or, upon his refusal to act, by a creditor in the name of the trustee. *Chatfield v. O'Dwyer*, 101 Fed. 797 (C. C. A. 8, 1900); *Ohio Valley Bank Co. v. Mack*, 163 Fed. 155 (C. C. A. 6, 1906); *Fred Reuping Leather Co. v. Ft. Greene Nat. Bank*, 102 F. (2d) 372 (C. C. A. 3, 1939). See also, under Section 77B, *Jonas v. Bellerive Inv. Co.*, 90 F. (2d) 688 (C. C. A. 8, 1937); certiorari denied, 302 U. S. 724; *Christian v. R. Hoe & Co.*, 79 F. (2d) 541 (C. C. A. 2, 1935). Under Chapter X, however, creditors and stockholders have been permitted to appeal in their own name from orders primarily affecting the estate on the theory that Congress, in specifically giving them the right to be heard, intended to give the right to appeal.¹¹ These liberal provisions for direct investor participation effected no change in

¹¹ See Sections 169, 174, 179, and 206, and see *In re Keystone Realty Holding Co.*, 117 F. (2d) 1003 (C. C. A. 3, 1941); and *Dana v. S. E. Co.*, 125 F. (2d) 542 (C. C. A. 2, 1942). Similarly, as to railroad reorganizations, see Section 77 (c) (13). Under Section 77B creditors and stockholders had the right to be heard on the permanent appointment of the trustee, on the proposed confirmation of a plan, and on such other questions as the judge should determine. Section 77B (c).

the essentially representative nature of appeals in a bankruptcy proceeding which, if successful, would benefit others than the appellant. These provisions presumably were in recognition of the diverse and conflicting interests involved in bankruptcy reorganizations which might not be adequately represented by a single representative of the entire estate. The effect of the new statutory provisions is to permit direct attack on the fairness of the plan and review of an adverse ruling as to fairness in lieu of the equity receivership practice under which the creditors had an individual right to attack the plan collaterally for the purpose of reaching assets inequitably diverted.¹²

2. The fact that the appeal by Potts and Boag was not expressly designated as a class suit cannot discharge them from the obligations resulting from its representative nature. Although courts have sometimes required certain types of actions to be expressly designated as representative,¹³ this requirement is a preventative against abuse, and the power of courts to protect the rights of others who might be involved is not dependent upon such

¹² See page 25, *infra*.

¹³ *Hayden v. Perfection Cooler Co.*, 227 Mass. 589, 590-91, 116 N. E. 871 (1917) (stockholder's derivative action); *Geo. W. Signor Tie Co. v. Monett & S. W. Construction Co.*, 198 Fed. 412, 413 (E. D. Mo.) (creditor's action to recover unpaid stock subscriptions); *Terry v. Little*, 101 U. S. 216 (creditor's action to enforce stockholder's "double liability"); *Alsop v. Conway*, 188 Fed. 568, 575 (C. C. A. 6), certiorari denied, 223 U. S. 720 (same).

designation.¹⁴ In *Sprague v. Ticonic National Bank*, 307 U. S. 161, this Court recognized the comparative unimportance of the label attached to a suit affecting a class. That case involved a claim for counsel fees and litigation expenses on behalf of a depositor of a closed bank who had established her right to priority of her own deposit by a suit prosecuted in her individual behalf. By reason of *stare decisis* the litigation of her claim established the rights of an entire class of depositors similarly situated. In holding that she was not barred from receiving compensation from the fund payable to all other depositors similarly situated, this Court stated (at pp. 166-167):

That the party in a situation like the present neither purported to sue for a class nor formally established by litigation a fund available to the class, does not seem to be a differentiating factor so far as it affects the source of the recognized power of equity to grant reimbursements of the kind for which the petitioner in this case appealed to the chancellor's discre-

¹⁴ An action to set aside a conveyance as a fraud on creditors, not designated as a class suit, has been construed as if brought in the name of a class, as required by statute. *Honesdale Shoe Co. v. Montgomery*, *supra* note 8. Similarly, no matter how designated, an individual seeking relief which is only available in a general creditor's action does not have the same right to dismiss the action which is available to a party in individual litigation. *Naspo v. Summit Sweet Shoppe*, 106 N. J. Eq. 49, 150 Atl. 199 (1930), *supra* note 8. And see *Wood v. Dummer*, 3 Mason 308, 30 Fed. Cas. 435, 440 (Case No. 17,944, C. C. D. Maine, 1824).

tion. * * * Whether one professes to sue representatively or formally makes a fund available for others may, of course, be a relevant circumstance in making the fund liable for his costs in producing it. But when such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation—the absence of an avowed class suit or the creation of a fund, as it were, through *stare decisis* rather than through a decree—hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation. As in much else that pertains to equitable jurisdiction, individualization in the exercise of a discretionary power will alone retain equity as a living system and save it from sterility.

While the *Sprague* case involved only the right of an individual plaintiff against the beneficiaries of her action, we submit that the power of a court of equity to do justice “as between a party and the beneficiaries of his litigation” requires the recognition of concomitant responsibilities attaching to a party seeking to establish common or derivative rights under the aegis of a bankruptcy court whether or not his suit is formally designated as representative.¹⁵

3. The status of Potts and Boag as members of a protective committee precluded them from appealing solely on their own behalf. In our

¹⁵ Cf. Hornstein, *Problems of Procedure in Stockholders' Derivative Suits* (1942), note 9, *supra*, at p. 584.

memorandum in support of the petition for certiorari we did not address ourselves to petitioner's argument that Potts and Boag owe a duty to account because of their past connections with protective committees for the preferred stockholders. However, since the writ was granted without restriction, we now state our reasons for agreeing with petitioner that these past connections are sufficient in themselves to charge Potts and Boag with fiduciary responsibility to other stockholders of the debtor.

Potts and Boag had initially voiced objections to the junior debt claim while acting in a representative capacity, as members of a protective committee for the preferred stockholders. As this Court has held, protective committee members are fiduciaries, bound to give loyal and disinterested service in the interest of those for whom they purport to act; they cannot serve both their beneficiaries and themselves where there is any possibility of conflicting interest. *Woods v. City National Bank and Trust Co.*, 312 U. S. 262; *American United Mutual Life Insurance Co. v. City of Avon Park*, 311 U. S. 138. Congress, in Chapter X, has recognized the importance of judicial control over protective committees and their members in bankruptcy reorganization proceedings by authorizing the reorganization court to scrutinize the provisions of their agreements and authorizations, with power

to nullify any provision which is found to be unfair or not consistent with public policy (§ 212). They must also file with the court a statement under oath setting forth their powers, the history of their formation, the amounts of various securities held by them, the amounts paid therefor and the amounts of the claims or stock which they represent (§ 211). Their compensation for services rendered in the reorganization must be disallowed if they have traded in the claims or stock of the debtor (§ 249), and the court is empowered to limit any claim or stock acquired by a committee in contemplation or in the course of the proceeding to the actual consideration paid therefor (§ 212). The clear purpose of these provisions is to avoid creation of conflicting interests which might interfere with the discharge of fiduciary responsibilities assumed in connection with a reorganization and also to avoid inequitable profits from inside information acquired in a fiduciary capacity. From the point of view of both considerations the fiduciary relationship once assumed must be held to impose continuing limitations upon the fiduciary's freedom of action.

Having voluntarily assumed this status, Potts and Boag could not shuffle off their fiduciary responsibilities merely by resigning from the committee and proceeding in their own names. If a committee member could always resign his re-

sponsibilities whenever he discovered a means of securing profit for himself and thus forestall accounting to those he has represented, the elaborate statutory provisions for the protection of those represented would be thwarted. This cannot be permitted. Thus, under Section 249, an attorney has been denied compensation for services to a committee where the attorney had trafficked in the debtor's securities prior to the time he represented that committee but while he was representing another committee from which he later resigned. *In re Reynolds Investing Co.*, 130 F. (2d) 60 (C. C. A. 3, 1942). The court there observed: "If the conclusion were otherwise, a fertile field of fraud would be opened. By the mere expedient of a change of client or of a cestui que trust in the proceeding an attorney or trustee could receive compensation otherwise prohibited to him."

It is not necessary to determine whether under any circumstances it would be possible for a committee member to resign and thereafter participate in the proceeding in disregard of the rights of those he had previously represented. In this case it is clear that not only did Potts and Boag take no effective steps after their resignation to apprise other stockholders that they no longer acted in a representative capacity, but they actively fostered the impression that they continued in such a capacity. They represented to stock-

holders that they had formed a committee of their own for the purpose of further objecting to the plan and they refrained from notifying these stockholders that they had decided to institute the appeal solely on their own behalf.¹⁶ In failing to make any effort to prevent other security holders from being lulled into sleeping on their rights in reliance upon the assurance that they were continuing to act for the security holders, Potts and Boag are in no position to contend that they were free to profit from the sale of their appeal by the device of appealing in their individual names.

II

IT IS INEQUITABLE AND CONTRARY TO THE AIMS OF
BANKRUPTCY REORGANIZATION TO PERMIT POTTS
AND BOAG TO RETAIN THE FRUITS OF THEIR SALE OF
THE APPEAL

In this case Potts and Boag, by jettisoning the rights of others for their own gain, brought about a result which violates a fundamental principle of

¹⁶ Potts testified that in response to a letter he and Boag sent out under the name of Independent Preferred Stockholders Committee, in which they had urged stockholders to disapprove the plan and "Without any obligation whatsoever" to "join in this fight to the finish," they received "a few" replies from stockholders, some of whom "expressed a desire that the objections be prosecuted" (R. 178, 186). No further communications were sent out and Potts admitted that certain of the replying stockholders may well have thought that their interests continued to be represented by the Independent Preferred Stockholders Committee (R. 187).

bankruptcy reorganization calling for equal treatment of security holders of the same class unless there are special equities calling for subordination. See *Prudence Realization Corp. v. Geist*, 316 U. S. 89, 97. Having strenuously contended that the confirmed plan was inequitable to all preferred stockholders, they abused the privilege of participation which the statute accorded them by exacting additional compensation for themselves to still their objections. Through the device of selling their securities they prevented the appeal, which they had taken on the ground that the plan was unfair, from ever reaching a hearing by an appellate court. They also avoided an outright compromise of their contentions under the auspices of the bankruptcy court (compare Sec. 27 of the Act). The power and duty of the bankruptcy court to correct this highly inequitable result stems from the fact that it is a court of equity, and that in reorganization proceedings the court has a broad responsibility to make sure that the judicial power is not perverted to cause inequitable results.¹⁷

¹⁷ In *American United Mutual Life Insurance Co. v. City of Avon Park*, 311 U. S. 138, 145-146, this Court declared:

As this Court stated in *Securities and Exchange Commission v. United States Realty & Improvement Co.*, 310 U. S. 434, 455: "A bankruptcy court is a court of equity, § 2, 11 U. S. C., § 11, and is guided by equitable

This power and duty are emphasized by reference to the central purpose of the statutory provisions whereby bankruptcy reorganizations have largely superseded the reorganization function of the equity receivership. A compelling reason for bringing corporate reorganization within the Bankruptcy Act was the need for efficient judicial supervision and control capable of fairly and finally determining the rights of

doctrines and principles except in so far as they are inconsistent with the Act. . . . A court of equity may in its discretion in the exercise of the jurisdiction committed to it grant or deny relief upon performance of a condition which will safeguard the public interest." And see *Pepper v. Litton*, 308 U. S. 295, 304 *et seq.* * * * Where * * * investigation discloses the existence of unfair dealing, a breach of fiduciary obligations, profiting from a trust, special benefits for the reorganizers, or the need for protection of investors against an inside few, or of one class of investors from the encroachments of another, the court has ample power to adjust the remedy to meet the need. The requirement of full, unequivocal disclosure; the limitation of the vote to the amount paid for the securities (*In re McEwen's Laundry, Inc.*, 90 F. (2d) 872); the separate classification of claimants (see *First National Bank v. Poland Union*, 109 F. (2d) 54, 55); the complete subordination of some claims (*Taylor v. Standard Gas & Electric Co.*, 306 U. S. 307; *Pepper v. Litton*, *supra*), indicate the range and type of the power which a court of bankruptcy may exercise in these proceedings. That power is ample for the exigencies of varying situations. It is not dependent on express statutory provisions. It inheres in the jurisdiction of a court of bankruptcy.

security holders in one proceeding.¹⁸ Under prior practice the necessity for ancillary proceedings sometimes resulted in claimants of the same class receiving different degrees of participation.¹⁹ Further inequities resulted from the fact that prior to receivership, those seeking control of a reorganization sometimes arranged for payments to claimants or their attorneys who threatened to institute a receivership in a forum deemed undesirable.²⁰ Even when all the debtor's property was within the jurisdiction of a single

¹⁸ "It is believed that such a process in bankruptcy will have great advantages over the cumbersome form of procedure under creditors' bills which has been evolved in the Federal equity courts. * * * The equity process frequently requires expensive and uncoordinated ancillary proceedings in many courts. Effective reorganization is often dependent upon costly and long-delayed foreclosure proceedings. The Federal courts in the conduct of these proceedings are charged with responsibility through their receivers during long periods of time, for the management of extensive business properties. The reorganization plan under which a committee buys in the property at foreclosure is not brought within the effective supervision and control of the court. Creditors who do not appear in the proceedings may in later years appear and enforce their claims against the reorganized company, if the plan has not adequately protected their interests." *Report of the Attorney General on Bankruptcy Law and Practice*, Sen. Doc. No. 65, 72d Cong., 1st Sess. (1931), 90.

¹⁹ See Note, *Proof of Pre-Receivership Claims and Distribution of Receivership Assets in Primary and Ancillary Jurisdictions*, (1934) 82 U. of Pa. L. Rev. 848.

²⁰ Cf. Rodgers and Groom, *Reorganization of Railroad Corporations under Section 77 of the Bankruptcy Act*, (1933) 33 Col. L. Rev. 571, 589.

court, the machinery for reorganization provided by equity receivership was not adequate to assure equal participation by all security holders of the same class. Such reorganizations were effected through a sale of the property and its transfer to a new corporation under a plan by which various security holders were given a measure of participation determined by representatives of various groups. Although equity courts evolved doctrines of fairness as between security holders, the court in which the sale took place had only a limited supervision over the terms of the plan. Nor were the rights of claimants against the old corporation necessarily determined by the receivership court. Individual security holders could become parties only by intervention, which was in the discretion of the court, and a dissenter who did not intervene could subsequently attack the sale collaterally as a fraudulent conveyance and seek to enforce an individual right against the assets.²¹

²¹ Instances of such methods of attack on unfair plans are *Railroad Company v. Howard*, 7 Wall. 392 (1868); *Northern Pacific Ry. Co. v. Boyd*, 228 U. S. 482 (1913). As recently as the *National Radiator Co.* case, *First National Bank of Cincinnati v. Flershem*, 290 U. S. 504, 521 (1934), where this Court reversed the action of the courts below in holding that a court of equity had jurisdiction to appoint a receiver and provide for a receivership sale to reorganize a solvent corporation, it was indicated that the effect of the successful challenge to the plan was limited to such creditors as had objected, but would not affect the status of approximately 95% of the holders of securities of the same class which had

Whether such a dissenter's attack should succeed depended not only upon the existence of unfairness in the plan but also upon the non-existence of equitable defenses against him in his individual capacity.²² Thus, from the standpoint of the overall reorganization, the machinery developed in the equity courts was sometimes inadequate to prevent security holders of the same class from receiving unequal participation in the assets.

The bankruptcy reorganization statutes, designed to meet the foregoing inadequacies of equity reorganizations, give a single court of bankruptcy jurisdiction over all claims against the debtor and power to supersede all proceedings commenced in other courts in order that

been deposited in support of the reorganization plan. The Court said:

"* * * The debenture holders who, by assenting to the Plan, cooperated with the Corporation and the Reorganization Committee, are in no position to complain that these petitioners will fare better than they. Compare *Davis v. Virginia Ry. & Power Co.*, 229 Fed. 633, 642. Since the assets fraudulently conveyed far exceed the amount of the claims of all non-assenting creditors, none of these could have occasion to object to the payment of these petitioners in full."

In *Northern Pacific Railway Co. v. Boyd*, *supra*, a collateral attack made by an unsecured creditor seven years after the confirmation of the sale was successful. It was held that relief was not precluded although another creditor on behalf of himself and all other creditors holding contingent and unsecured claims had unsuccessfully made a similar challenge to the fairness of the plan in the original receivership proceeding.

²² See cases cited, footnote 21, *supra*.

each claimant may receive an equitable participation in the assets of the estate and that a race of diligence among them may be avoided.²³ To this end all the assets of the debtor wherever located are in the custody of the court and their administration is supervised by the court. No plan of reorganization can be effected unless, after a hearing upon notice to all claimants, the court finds it to be fair. Nor can any modification of the plan be made without court approval. Thus, the collateral attacks which were possible in equity receiverships are eliminated and the statute provides for final determination of the participation of all claimants based upon principles of fairness and equity. Whether or not they actively take part in the proceeding, all claimants are entitled to rely upon the exercise by the court of its supervision over all steps of the reorganization with a view to ensuring that their interests are fairly compensated. We have seen that one of the principles of fairness and equity is equal treatment of all who have claims of the same rank. Thus, a plan cannot be held unfair to one litigant unless it is held unfair to all other participants in the same situation. Consequently, there can be no compromise on terms beneficial solely to the objector of contentions than a plan is unfair; the

²³ *Cf.* James A. McLaughlin, Hearing Before the House of Representatives Committee on the Judiciary on H. R. 8046, 75th Cong., 1st Sess. (1937), 8-11.

only permissible form of "compromise" is an offer to improve the position under the plan of the entire class sought to be benefited by the objection.

Section 222 of the Act, specifically providing for modification of a Chapter X plan before or after its confirmation, sets forth a procedure whereby the judge can pass upon any such proposal to "compromise" contentions respecting the fairness of a plan. In requiring any changes in rights dealt with in the plan to be passed upon by the court (and when they materially and adversely affect classes of security holders, to be accepted by the requisite number thereof), Section 222 affords protection with respect to modifications of a plan similar to that bestowed upon the original plan. This procedure is necessarily applicable where a contention that a plan is unfair has been established on appeal, unless the appellate determination requires a completely new plan to be effected. It must have been intended to be equally applicable where settlement of such a contention is effected.

That this is the solution to the problems arising from agreements to sell an appeal concerning the fairness of the plan, under circumstances like that of the present case, is compelled by the fact that any settlement outside the framework of the plan would undermine the objective of the Act to have the participation of all classes of claimants fairly and finally determined under the auspices of the

reorganization court. If individual litigants could keep for themselves the proceeds of whatever deal they might effect, the door would be open to infirmities similar to those incident to the equity procedure which the reorganization statutes were intended to cure. A new race of diligence would result since participants might object to reorganization plans and prosecute appeals therefrom even where they have no basis for believing their objections to be sound, in the hope of exacting from other interested participants something more than the amounts received by fellow members of their class.²⁴ Benefits to security holders from a reorganization would thus depend upon their skill in negotiation rather than upon principles of equity, and the right of security holders to take part in the proceeding would become an instrument of inequity and delay instead of an aid in the formulation of a plan.

²⁴ Section 203 authorizes the Court to disqualify for the purpose of voting on a plan, any claim or share, the holder of which is accepting or refusing to accept the plan in bad faith. While a security holder may thus not properly object to a plan for the purpose of getting a nuisance value for his security, the device of permitting him to demand this nuisance value at the appellate stage, without exacting any penalty for such misconduct, will clearly result in circumventing the purpose of Section 203. *Cf. Texas Hotel Securities Corp. v. Waco Development Co.*, 87 F. (2d) 395 (C. C. A. 5), certiorari denied, sub nom. *Waco Development Co. v. Rupe*, 300 U. S. 679. See also William O. Douglas, Hearings before the House of Representatives Committee on the Judiciary on H. R. 8046, 75th Cong., 1st sess. (1937), pp. 183-184; and John C. Knox, *ibid.*, 365-366.

A construction requiring that any settlement of contentions as to fairness of a plan must be brought within the framework of the plan places no unfair burden upon persons undertaking to represent the interests of a class. Such persons, having acted in a proper manner and without attempting to appropriate any fruits of the "compromise" for themselves, can rely on the court to compensate them for any benefits they achieve for the estate as a result of their efforts. *In re Keystone Realty Holding Co.*, 117 F. (2d) 1003, 1006 (C. C. A. 3, 1941); and *Sprague v. Ticonic National Bank*, 307 U. S. 161, *supra*.²⁵ Nor would such a construction preclude settlements in the interest of termination of the litigation. It would require only that upon the abandonment of an appeal any concession made by the appellee should be through a modification of the plan.²⁶

²⁵ *Cf.* Section 243 of the Act, giving the judge of the reorganization court power to allow reasonable compensation for services rendered by creditors and stockholders, and Section 249, forbidding compensation to "any committee or attorney, or other person acting in the proceedings in a representative or fiduciary capacity, who at any time after assuming to act in such capacity has purchased or sold" securities of the debtor without the consent of the judge. These provisions would be nullified if persons in a representative capacity were permitted to appropriate the fruits of the settlement through sale of their securities.

²⁶ It is true that even where such a modification is proposed the appellate court might permit another party to intervene and carry on the appeal. It is unnecessary here to consider in what circumstances such intervention might be deemed appropriate.

In the present case the fact that all participants were subjected to the disadvantage of delay in consummation of the confirmed plan during the pendency of the appeal by Potts and Boag; the fact that Potts and Boag sold out at a time when they alone held the bargaining power of the entire class, since the time for appeal from the confirmation order had then expired; and the fact that the holders of the junior debt paid more than the improved position that Potts and Boag had sought for themselves by the appeal, indicate that the payment was indistinguishable from a compromise of the participation of the junior debt under the plan, except that Potts and Boag appropriated to themselves the entire proceeds from ~~selling~~ the class suit. Even where a plan has the affirmative support of the statutory percentage of security holders the court has a responsibility for the fairness of treatment of all affected, and cannot tolerate a "concealed compromise" of disputed issues relevant to the fairness of the plan which side-steps judicial supervision. Cf. *Consolidated Rock Products Co. v. Du Bois*, 312 U. S. 510, 523. In settling their contentions through a sale of their securities and thereby avoiding the statutory machinery designed to prevent an inequitable result, Potts and Boag violated the responsibility they undertook when they sought to enforce class rights by appeal.

III

POTTS AND BOAG SHOULD BE DIRECTED TO PAY OVER
TO THE DEBTOR THE CONSIDERATION THEY RE-
CEIVED FOR SELLING THE APPEAL

Since the proper procedure for a compromise of the contentions made by Potts and Boag would have been through an amendment to the reorganization plan, which would presumably have reduced the participation accorded the junior debt claim by the amount Potts and Boag received as consideration for dismissing the appeal, such procedure would have benefited all participants subordinate to the junior debt. An equitable result can be reached here by requiring Potts and Boag to pay over to the debtor the consideration they received for ending the appeal. This increase in the assets of the debtor will benefit junior security holders who have participated under the plan substantially to the same extent as if the debt had been decreased in that amount.

Such relief is not barred by the orders of the circuit court of appeals denying Young's application to intervene and dismissing the appeal. Although Young's earlier application, like the application under consideration here, was predicated on the ground that respondents were prosecuting their appeal as representatives of the preferred stockholders, there exists no basis for *res judicata*. In opposition to Young's application to intervene

and continue the appeal, it was properly urged that he had failed to object to the confirmation of the plan and that he had ulterior motives. Certainly, in determining whether to permit Young to continue the appeal, the court was entitled to find that his failure to object to the plan in the lower court estopped him from contesting its inequity at the appellate level. Effective appellate administration and proper functioning of reorganization machinery both require an appellate court, in the absence of strong countervailing equities, to refuse to hear objections to a plan which are offered by a person who failed to urge them in the reorganization court. *Cf. In re Prudence Bonds Corp.*, 79 F. (2d) 205 (C. C. A. 2), certiorari denied, 296 U. S. 652. The ulterior motives urged on the prior application were presumably the same actions of Young complained of on the instant application—that his purpose was to prevent abandonment of the appeal by Potts and Boag prior to the time when he would be able to foreclose and acquire possession of the stock and debt claims held by Bradley and Murphy. If the circuit court of appeals was persuaded of the truth of such allegations, it could hardly have found that Young was a proper party to carry on the appeal and contest the participation accorded the junior debt under the plan when the very purpose of his intervention was to gain time in which to acquire that debt for himself, after which he

would, of course, have no interest in demanding its subordination.

However, neither the fact that Young did not object to the plan in the reorganization court nor that he may have had ulterior motives in seeking to intervene on the earlier appeal is reason to deny the relief sought in this proceeding to require Potts and Boag to pay over the consideration they received for selling their appeal. Where appeals from confirmation orders on the ground of unfairness of the plan have been successful, the new plans have made no distinction between security holders who accepted and security holders who objected to the plans originally confirmed.²⁷ Clearly, acceptance of a bankruptcy reorganization plan is not a waiver of rights to equality of treatment. Nor does the obligation of the reorganization court to require fair treatment to all security holders rest on the identity of the moving party. So long as the facts are properly before it, the court is free to exercise its power to prevent perversion of its order confirming the plan by acting on its own motion. If it should find that Young is not a proper party to prosecute an accounting suit for the estate, the court can appoint a satisfactory representative to do so.

There can be no presumption that, in permitting the abandonment of the appeal after finding that

²⁷ E. g., cf. plan in *Taylor v. Standard Gas & Electric Co.*, 306 U. S. 307, with plan in *Standard Gas & Electric Co. v. Deep Rock Oil Corp.*, 117 F. (2d) 615 (C. C. A. 10, 1941).

no qualified person sought to carry it on, the court condoned the retention by Potts and Boag of the proceeds of their sale. It was never contemplated that an appellate court which has before it only one aspect of the reorganization proceeding should undertake to administer the entire reorganization machinery. It must be assumed that questions as to the proper disposition of the proceeds received by Potts and Boag for abandonment of their appeal were left for determination by the reorganization court which has before it the entire reorganization and is in a position to integrate the proceeds with the plan.

By refusing to permit Potts and Boag to retain the consideration they received for ending the appeal, this Court will set no precedent which will handicap the proper compromise of appeals from orders of confirmation. It will require only that such compromises be made within the framework of the plan of reorganization subject to the scrutiny of the reorganization court and therefore benefit all who would have benefited had the appeal been successful. Incentive to fight for fair plans will not be curtailed since, as we have pointed out, those establishing common rights are undoubtedly entitled to an allowance reflecting the extent to which their services benefit the estate or the class of investors affected. Such a determination will, however, clearly establish that the just and expeditious reorganization of estates may

not be impeded in the interests of those seeking unjust enrichment out of the reorganization.

In our memorandum in support of the petition for a writ of certiorari we pointed out that the issues in this case are of importance in the administration of the Public Utility Holding Company Act of 1935. The Commission has had at least one experience where stockholders of a registered holding company sought review of a Commission order approving a reorganization plan and thereafter abandoned their petition before hearing on the merits under circumstances which would seem to indicate that their securities had been purchased in excess of their fair value. While the provisions of the Holding Company Act broadly permit any security holder "aggrieved" by the Commission's order to file a petition for review, it is the Commission's view that such proceedings are representative in character. Application in the context of the Holding Company Act of the principles which we urge in this brief may present procedural problems which are not involved here and which the Court need not now consider. However, a decision in this case that security holders may retain the fruits of selling out an appeal would afford the same encouragement to abuse of the privilege of individual security holders to seek review of orders

affecting class rights under the Holding Company Act as would be the case in the application of such a ruling to Chapter X appeals. Under neither statute would the result be consonant with the legislative intention or proper respect for the judicial process.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted.

✓ CHARLES FAHY,
Solicitor General.

✓ ROGER S. FOSTER,
Solicitor,

MILTON V. FREEMAN,
Assistant Solicitor,

THEODORE L. THAU,
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DAVID FERBER,
Attorney,
Securities and Exchange Commission.

JANUARY, 1945.

SUPREME COURT OF THE UNITED STATES.

No. 342.—OCTOBER TERM, 1944.

Robert R. Young, Petitioner,	} On Writ of Certiorari to	
vs.		the United States Circuit
The Higbee Company, William W.		Court of Appeals for the
Boag and J. F. Potts.		Sixth Circuit.

[February 26, 1945.]

Mr. Justice BLACK delivered the opinion of the Court.

This case presents the question of the accountability of stockholders who objected to the confirmation of a plan of reorganization under the Bankruptcy Act,¹ and abandoned their appeal for a consideration to themselves, where the basis of the appeal was that, if successful, it would benefit the entire class.

The Higbee Company, a department store with assets of more than six million dollars, filed a voluntary petition for reorganization. It had three types of stocks, common, and first and second preferred. Two of its directors, Bradley and Murphy, claimed that they had acquired by purchase a junior debt against the company of \$1,952,000.00. A plan for reorganization was presented under which the owners of this junior debt were to be awarded \$600,000.00 in new notes and a large block of common stock. Potts and Boag, respondents here, and owners of some shares of first preferred, objected to confirmation of the plan. They contended, on several grounds, that unless the junior debt was subordinated to the preferred stock claims, the plan allotted that indebtedness too great a share in the distribution of the bankrupt's assets.² When the stockholders' committee of which they

¹ The proceedings were begun in 1935 under Section 77 B, 11 U. S. C. 207. June 22, 1938, Congress passed the Chandler Act, and the provisions of Chapter 10 of the Act were thereafter applicable to these proceedings. 52 Stat. 883-905, 11 U. S. C. 501-676.

² This \$1,952,000.00 junior indebtedness consisted of subordinated notes of The Higbee Company which had been bought by Midamerica Corporation for \$100,000.00 at an auction sale in 1935. Potts and Boag consistently maintained that the junior debt's participation in Higbee's assets should be limited to \$100,000.00. They charged that Bradley was a director of Higbee and of Midamerica, and thus occupied two conflicting fiduciary positions. They insisted that the court should find this junior debt to be "invalid and unenforceable in whole or in part" and "subordinated to the First and Second Preferred Stock."

were members approved the plan, Potts and Boag resigned and announced the formation of a new committee to press their objections to the junior debt allowance. Notwithstanding these objections, the Securities & Exchange Commission recommended the plan's acceptance, 8 S. E. C. 777, and the District Court confirmed it. Potts and Boag appealed from the District Court's decree confirming the plan. Although appealing as individuals, their appeal was based almost entirely on objections to allowances for the junior indebtedness which left less for distribution among all the preferred stockholders. Their appeal sought no separate individual relief for themselves; they appealed only to have the confirmation set aside. Had their appeal succeeded, the District Court would have been required to reduce the value of junior claims asserted by Bradley and Murphy, thereby increasing the value of the claims of the preferred stockholders as a class.

In this situation, Potts and Boag sold their stock and their appeal³ to Bradley and Murphy, claimants under the junior debt; the consideration paid was \$115,000.00. The par value of this stock was \$26,000.00. Its admitted market value at the time, as the court below found, was \$17,000.00. Pursuant to this contract for sale of the appeal a stipulation for dismissal was filed in the Circuit Court of Appeals. Petitioner Young, a preferred stockholder of the same class, sought to intervene and prosecute the appeal. His petition was denied and the case was dismissed without opinion. Young then, on behalf of himself and all other preferred stockholders, filed a petition in the District Court setting up these facts and praying that he be authorized to employ counsel to compel Potts and Boag to account to the debtor for the

³ Potts' testimony as to the sale was:

"Q. So that in a sense you were selling something more than your stock, I take it? A. I think so.

"Q. You were selling the appeal which you had taken in behalf of yourself and Mr. Boag; that is a fair statement, isn't it? A. I think so."

The written contract between Potts and Boag and Bradley and Murphy specifically provided for sale of the appeal as well as the stock. It reads in part:

"I hereby sell, assign, transfer and set over unto Charles L. Bradley and John P. Murphy, and their assigns, 260 shares of First Preferred stock of The Higbee Company, of Cleveland, Ohio, . . . together with all rights, title and interest, benefits or privileges we, or either of us, have or may have in and to or by virtue of or arising from the matter of The Higbee Company, Debtor, J. Fred Potts and William W. Boag, Appellants, vs. The Higbee Company, Appellee, and a certain appeal taken by J. Fred Potts and William W. Boag in said proceedings, which said appeal is now pending in the United States Circuit Court of Appeals for the Sixth Circuit. . . ."

difference between what they received and the fair value of their stock, or praying in the alternative that Potts and Boag be required to pay over that amount to the preferred stockholders.⁴ After a hearing, a special master found as a fact that Potts and Boag had appealed in behalf of themselves only and had not acted as representatives of a class. The District Court approved this finding, thought it determinative of the case, and dismissed Young's petition. The Circuit Court of Appeals affirmed. 142 F. 2d 1005. Because considerations of substantial importance to the effective administration of corporate reorganizations are involved, we granted certiorari, — U. S. —.⁵

First. It is argued that since the Circuit Court of Appeals dismissed the appeal of Potts and Boag over Young's attempt to intervene, Young is estopped from prosecuting the present petition. This contention has no merit, for the reason, among others, that the determinative issues in the two proceedings were not the same. The first petition did not pray for an accounting by Potts and Boag. The court only decided then that Young could not intervene and continue that appeal, and that the appeal should be dismissed. Now, accepting the court's dismissal of the appeal as final, Young seeks an accounting for the consideration paid Potts and Boag for agreeing to dismiss.

Second: It is argued that since Potts and Boag did not expressly specify that they appealed in the interest of the whole class of preferred stockholders, but appealed only in their own names, they owed no duty to any stockholders but themselves. The appeal here, however, was not from a denial of any individual claim of Potts and Boag. Its basis was that every other preferred stockholder, as well as themselves, would be injured by confirmation. So far as the issues raised by the appeal are con-

⁴ In both courts below Young sought an order against Bradley and Murphy as well as Potts and Boag but Bradley and Murphy have not been made respondents in this Court.

⁵ The petitioner has made the following statement to this Court with reference to the respondent Boag:

"During the course of the appeal in the Circuit Court of Appeals it first came to Petitioner's attention that Respondent Boag had entered the Armed Services. No one representing Boag has appeared to request a stay of proceedings pending his return. However, Petitioner has no desire to cause judgment to be entered against Boag under these circumstances. It would be entirely satisfactory to have the proceedings stayed as to Boag pending his return, although no rights against him are waived."

Under these circumstances no judgment against Boag will be entered in this case and the proceedings in the Circuit Court of Appeals will be stayed as to him. Soldiers' & Sailors' Civil Relief Act of 1940, 54 Stat. 1178.

cerned, the rights of Potts and Boag and the other preferred stockholders were inseparable. Thus, even though their objection to confirmation contained no formal class suit allegations, the success or failure of the appeal was bound to have a substantial effect on the interests of all other preferred stockholders. The liability of one who assumes a determining position over the rights of others must turn on something more substantial than mere formal allegations in a complaint.⁶ Equity looks to the substance and not merely to the form.

Furthermore, the right of appeal granted by a statute should not be interpreted in such way as to defeat rights clearly granted in other parts of the same Act. *Peck v. Jennes et al.*, 7 How. 612, 623. Potts and Boag appealed under Sec. 206 of the Chandler Act, which, contrary to the general bankruptcy procedure, grants any stockholder or creditor the right to be heard on all matters relating to corporate reorganizations. Courts have liberally construed this language as authorizing appeals.⁷ We are now asked to say that the privilege of appeal granted to Potts and Boag by the Act vested them with an indefeasible right to sell the privilege to the disadvantage of all other stockholders in their class. But, historically one of the prime purposes of the bankruptcy law has been to bring about a ratable distribution among creditors of a bankrupt's assets; to protect the creditors from one another.⁸ And the corporate reorganization statutes look to a ratable distribution of assets among classes of stockholders as well as creditors. There would be no ratable distribution of this bankrupt estate if Potts and Boag could utilize their statutory right of appeal to get for their preferred stock \$7.00 for every \$1.00 paid to other preferred stockholders. We are asked to say that Congress intended such a consequence, and to construe the right of a stockholder to be heard on a plan of reorganization as carrying with it the right to "sell" the very appeal which the Act grants him.

⁶ *Sprague v. Ticonic Bank*, 307 U. S. 161. See *Atlas Bank v. Nahant Bank*, 23 Pick. (Mass.) 480; *Whitten v. Dabney*, 171 Cal. 621; *Honesdale Co. v. Montgomery*, 56 W. Va. 397; *Rawnsley v. Trenton Mutual Life Ins. Co.*, 9 N. J. Eq. 95; *Wood v. Dummer*, 30 Fed. Cas. 435, No. 17,944.

⁷ *In re Keystone Realty Holding Co.*, 117 F. 2d 1003; *Dana v. S. E. C.*, 125 F. 2d 542; *cf. Amick v. Mortgage Security Corp.*, 30 F. 2d 359.

⁸ *Boese v. King*, 108 U. S. 379, 385-386; *Sampson v. Imperial Paper Corp.*, 313 U. S. 215, 219; *cf. Case v. Los Angeles Lumber Co.*, 508 U. S. 196. See also 66 Pa. L. Rev. 224; Senate Document No. 65, 72nd Cong., 1st Sess., 6, 10, 49-93.

Potts and Boag, by appealing from a judgment which affected a whole class of stockholders owed an obligation to them, the full extent of which we need not now delineate. Certainly, at the very least they owed them an obligation to act in good faith. If Potts and Boag had declined to accept this plan in bad faith, the court, under Section 203⁹ could have denied them the right to vote on the plan at all. The history of this provision makes clear that it was intended to apply to those stockholders whose selfish purpose was to obstruct a fair and feasible reorganization in the hope that someone would pay them more than the ratable equivalent of their proportionate part of the bankrupt assets.¹⁰ If Potts' and Boag's opposition to confirmation sprang from such a purpose (and Potts and Boag did obstruct confirmation until they were able to "sell" their appeal) they were acting in bad faith within the statutory meaning of that term. And accepting money as the end result of such a statutory violation cannot vest them with a right to keep it. Payment to them of this money simply meant that the distribution of bankrupt assets to the junior debt claimants who paid Potts and Boag, would represent a smaller net value. The statute contemplates, and the appeal was taken on the assumption, that the less the junior claimants were awarded the more all the preferred stockholders would re-

⁹ "Sec. 203. If the acceptance or failure to accept a plan by the holder of any claim or stock is not in good faith, in the light of or irrespective of the time of acquisition thereof, the judge may, after hearing upon notice, direct that such claim or stock be disqualified for the purpose of determining the requisite majority for the acceptance of a plan." 52 Stat. 894.

¹⁰ A year before the House Committee on the Judiciary held its extensive hearings on the Chandler Act, a Circuit Court of Appeals held that a creditor could not be denied the privilege of voting on a reorganization plan under Sec. 77 B, although he bought the votes for the purpose of preventing confirmation unless certain demands of his should be met. *Texas Hotel Corp. v. Waco Development Co.*, 87 F. 2d 395. The hearings make clear the purpose of the Committee to pass legislation which would bar creditors from a vote who were prompted by such a purpose. To this end they adopted the "good faith" provisions of Sec. 203. Its purpose was to prevent creditors from participating who "by the use of obstructive tactics and hold-up techniques exact for themselves undue advantages from the other stockholders who are cooperating." Bad faith was to be attributed to claimants who opposed a plan for a time until they were "bought off"; those who "refused to vote in favor of a plan unless . . . given some particular preferential advantage." Hearings on Revision of the Bankruptcy Act before the Committee on the Judiciary of the House of Representatives, 75th Cong., 1st Sess. on H. R. 6439, Serial 9, pp. 180-182.

See also, on the same general topic, *McLaughlin, Capacity of Plaintiff-Stockholder to Terminate a Stockholder's Suit*, 46 Yale L. J. 421; *Hornstein, Problems of Procedure in Stockholder's Derivative Suits*, 42 Col. L. Rev. 574, *Rodgers and Groom, Reorganization of Railroad Corporations under Section 77 of the Bankruptcy Act*, 33 Col. L. Rev. 571, 588-601.

ceive. Therefore, the consideration of the sale which Potts and Boag made was not merely their own interest in the bankrupt estate, but the interest of all the preferred stockholders. The situation which enabled them to traffic in the interests of others was created by a statute passed to protect the interests of all of them.¹¹ The statute neither compels them to appeal nor to prosecute an appeal already taken contrary to their own interests; it does impose upon them the duty of good faith to all other stockholders whose interests they temporarily control because they are necessarily involved in the appeal. This control of the common rights of all the preferred stockholders imposed on Potts and Boag a duty fairly to represent those common rights.¹² This representative responsibility is emphasized by the fact that they might have been awarded compensation for their services had they succeeded in reducing the claim of the junior indebtedness to the advantage of all the preferred stockholders. Sec. 243; cf. Sec. 249. *In re Keystone Realty Holding Co.*, 117 F. 2d 1003, 1006. They cannot avail themselves of the statutory privilege of litigating for the interest of a class and then shake off their self-assumed responsibilities to others by a simple announcement that henceforth they will trade in the rights of others for their own aggrandizement. To hold that the Chandler Act permits this, would be to say that Congress, which sought more effectively to accomplish fair and equitable treatment of investors, had by granting a right of appeal to stockholders, defeated its purpose, and had substantially modified the whole body of law imposing the most rigorous responsibilities for fair dealing upon those who represent the rights of others.¹³

¹¹ See *Commission v. Sanders Radio Station*, 309 U. S. 470, 476-7; *I. C. C. v. Oregon-Washington R. Co.*, 288 U. S. 14, 25-7.

¹² By virtue of their standing as sole appellants, Potts and Boag, during the pendency of the appeal, dominated the fate of the reorganization as completely as though they had been the majority stockholders of a going corporation. Cf. *Southern Pacific Co. v. Bogert*, 250 U. S. 483, 492: "But the doctrine by which the holders of a majority of the stock of a corporation who dominate its affairs are held to act as trustees for the minority, does not rest upon such technical distinctions. It is the fact of control of the common property held and exercised, not the particular means by which or manner in which the control is exercised, that creates the fiduciary obligation. . . . The essential of the liability to account sought to be enforced in this suit lies not in fraud or mismanagement, but in the fact that, having become a fiduciary through taking control of the old Houston Company, the Southern Pacific has secured fruits which it has not shared with the minority. The wrong lay not in acquiring the stock, but in refusing to make a pro rata distribution on equal terms among the old Houston Company shareholders."

¹³ Cf. *Woods v. City Bank*, 312 U. S. 262, 267-269; *Meinhard v. Salmon* 249 N. Y. 458.

The money Potts and Boag received in excess of their own interest as stockholders was not paid for anything they owned. It came to them in settlement of litigation which if carried to a successful conclusion would have added to the value of other preferred stockholders of the common debtor. That the suit was settled and dismissed does not alter the rights of parties as to distribution of the fruits of the settlement. A distinction as to rights arising from litigation, which rests upon the difference between a judgment and a settlement of a lawsuit, under these circumstances, as in others, is "too formal to be sound." *Lyeth v. Hoey*, 305 U. S. 188, 195, 196; *Helvering v. Safe Deposit and T. Co.*, 316 U. S. 56, 63-67. The appeal of Potts and Boag was alleged to be for the benefit of all preferred stockholders. In the contemplation of the statute which authorized the appeal, its fruit properly belongs to all the preferred stockholders. One creditor, therefore, cannot make that fruit his own by a simple appropriation of it. Cf. *Terry v. Little*, 101 U. S. 216, 218.

Third: It is argued that even though the money paid in excess of the stock value does in equity and good conscience belong to the stockholders, the bankruptcy court is without power to award the relief prayed. Courts of bankruptcy are courts of equity and exercise all equitable powers unless prohibited by the Bankruptcy Act. *Securities and Exchange Commission v. United States*, 310 U. S. 434, 455. The District Court still has jurisdiction to exercise its powers under the Act both because of its express reservation and because of the provisions of Section 222.¹⁴ That power is ample to authorize the court to order an accounting for the funds in dispute here. *Pepper v. Litton*, 308 U. S. 295, 303-310; *American Insurance Co. v. Aven Park*, 311 U. S. 138, 145-147; *Consolidated Rock Co. v. DuBois*, 312 U. S. 510, 521-523.

Nor can we sustain the contention that relief should be denied on the allegations that Young's motive in bringing the proceeding is an unworthy one. His petition sought relief for the benefit of all the stockholders. The rights of these stockholders are not to be ignored because of some motive attributable to Young.

Reversed.

The CHIEF JUSTICE and Mr. Justice JACKSON concur in the result. Mr. Justice ROBERTS dissents.

¹⁴ This Section gives the judge power, under conditions applicable here, to alter and modify a reorganization plan even after confirmation.